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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1974

**No. 74-1055**

W. T. STONE, WARDEN,
*Petitioner,*

vs.

LLOYD CHARLES POWELL,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI
## To the United States Court of Appeals
## For the Ninth Circuit

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## PETITION FOR WRIT OF CERTIORARI
### To the United States Court of Appeals For the Ninth Circuit

The petitioner W. T. Stone, Warden of the Correctional Training Facility—Soledad, California, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 4, 1974.

### OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears as Appendix A to this petition; the

unreported opinion of the United States District Court for the Northern District of California appears as Exhibit B and the unreported opinion of the California Court of Appeal as Appendix C.

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## JURISDICTION

The judgment of the Court of Appeals was entered on December 4, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

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## QUESTIONS PRESENTED

1. Whether a state prisoner, who has been afforded a fair opportunity to raise his Fourth Amendment claims in the state courts and have them adjudicated by the state courts, may raise those same claims in collateral proceedings in the federal courts, which present no question regarding his innocence of the crime for which he is imprisoned.

2. Whether the exclusionary rule should apply to suppress the fruits of a reasonable search incident to an arrest for violation of a then-valid ordinance when the arresting officer acted upon probable cause.

3. Whether the Henderson, Nevada, vagrancy ordinance is constitutional.[1]

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[1]Although the validity of the Henderson, Nevada, vagrancy ordinance has tangential importance, we submit that a proper analysis of this case would make it unnecessary to reach this question.



4. Whether, if the murder weapon was erroneously admitted at respondent's trial, the error was harmless beyond a reasonable doubt.

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## STATUTE INVOLVED

The vagrancy ordinance of the City of Henderson, Nevada, reads:

"Every person is a vagrant who:

Loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by any peace officer to do so, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

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## STATEMENT OF THE CASE

### A. Proceedings in the State Courts

On June 6, 1968, Lloyd Charles Powell, petitioner and appellant below, respondent herein, was found guilty by a jury after trial in the Superior Court of San Bernardino County, California, of second degree murder (Calif. Pen. Code § 187). On June 10, 1968, he was sentenced to the California State Prison for the term prescribed by law, five years to life.

The judgment was affirmed by the California Court of Appeal in an unpublished opinion filed on October 7, 1969. (Appendix C).

Powell's petition to the California Supreme Court for a writ of habeas corpus was denied on July 1, 1970.

**B. Proceedings in the Federal Courts:**

On July 15, 1970, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. On September 17, 1970 the court entered an order denying the petition. An appeal from this order was dismissed by the United States Court of Appeals for the Ninth Circuit on July 15, 1971 pursuant to the stipulation of counsel. Respondent was given leave to file an amended petition in the district court.

An amended petition was filed in the district court on August 24, 1971. The jurisdiction of the district court was invoked under Title 28, U.S.C. § 2241. On February 8, 1972 the court entered an order denying the petition. A copy of the court's order is attached as Appendix B. On February 22, 1972 the court granted a certificate of probable cause to appeal.

On December 4, 1974 the United States Court of Appeals for the Ninth Circuit, which had jurisdiction in the matter under the provisions of Title 28, U.S.C. § 2253, filed an opinion reversing the judgment of the district court and remanding the cause to that court for further proceedings consistent with the court of appeals' opinion. The court of appeals' opinion is attached as Appendix A.

**C. Statement of the Facts Adduced at Trial:**

On the evening of February 17-18, 1968, Gerald Parsons and his wife Mary were working at the Bonanza Liquor Store in San Bernardino, California. At approximately midnight, Mr. Parsons was seated



in the rear office of the store while his wife was seated near the counter in the sales area of the store (RT 8-9).[2] Through a one-way glass, Mr. Parsons saw four men enter the store. Respondent Powell, one of these men, removed a bottle of wine from a shelf, put it inside his jacket, and closed the jacket. Parsons then approached him and questioned him about the wine. Parsons opened respondent's jacket, exposing a half-gallon bottle of wine. Respondent then struck Parsons in the mouth with his fist (RT 10-12, 29, 32).

The other men then started to walk out of the store. Parsons procured a .38 caliber revolver which he kept near the cash register. He then noticed that respondent had left the store (RT 12-13). However, respondent re-entered the store a short time later. Parsons pointed the gun at him as he advanced. He then raised the gun and fired a shot into the ceiling. Parsons then turned and placed the gun near an ice cream freezer. Respondent passed him and seized the gun. Parsons then heard an explosion, felt a bullet strike him in the wrist, and realized that he was bleeding (RT 16-17).

Parsons then ran for another gun which he kept in the office. At that time, he did not know where his wife was. A shot then rang out and she screamed. Parsons then heard the cash register bell ring. He returned from the office holding the second gun and observed Fred Buckley, one of the four men, leaning

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[2]The abbreviation "RT" refers to the Reporter's Transcript of respondent's trial.

over the cash register. He fired a shot at Buckley, who immediately ran out the door (RT 18-19). He then observed that his wife had been shot. Parsons last saw the first gun he handled in respondent's hand after he (Mr. Parsons) had placed it behind the ice cream freezer. He saw no one else handle the gun (RT 24).

Buckley testified that he observed respondent strike Parsons and saw Parsons obtain a gun from his wife. Parsons pointed the gun at respondent, who grabbed Parsons' arm. The gun then discharged. Respondent knocked the gun from Parsons' hand (RT 68-72). Buckley then saw respondent holding the gun and heard a shot fired. He observed Mrs. Parsons fall to the floor. He heard the gun discharge again and saw that Mr. Parsons had been shot in the arm (RT 85-86).

San Bernardino Police Officer Donald Covey took a statement from Buckley at the San Bernardino City Hall. Buckley stated that respondent had a bottle of wine hidden under his coat, that the manager spotted it, and that respondent then gained possession of the gun and "shot the manager's wife and, then, the manager" (RT 161-162).

John Chaney, another of respondent's companions, testified that as Parsons grabbed respondent's coat, "the wine fell to the floor and bust" (RT 164-166). Chaney stated that respondent then shoved Mrs. Parsons. Mrs. Parsons passed the gun to Mr. Parsons and "the scuffle started." The gun discharged during the scuffle, and Chaney ran from the store. The last time



Chaney saw the gun, it was in Parsons' hand, and respondent grabbed at it (RT 166-169).

At approximately 10:10 a.m. on February 18, 1968, Officer Edward Lattin of the Henderson, Nevada, Police Department, was on routine patrol in a marked police unit near the parking lot of a shopping center in the City of Henderson. He observed two men, one of whom was respondent, look at his police unit and quickly turn and walk in the opposite direction (RT 194-195). The men looked back toward the police vehicle several times and continued walking rapidly. The officer made a U-turn and approached them. They then split apart and began walking in opposite directions. The officer approached respondent from the rear and honked his horn. Respondent continued to walk toward the rear of a department store. The officer stopped his vehicle, jumped out, and asked him to halt. He then halted and turned around (RT 196-197).

The officer asked him whether he had any identification. He replied that his identification papers had been stolen. In response to further questions, respondent gave his name as Lloyd Charles Powell and his date of birth as January 6, 1947. The officer checked the name through the Henderson Police Department with negative results. Respondent stated that he had been staying with friends in Las Vegas but was unable to give their name or address (RT 197-198). He stated that he had been in Las Vegas "for the past few days" (RT 207). He also stated that he was en route to Michigan at that time (RT 199). Hender-

son is eight miles south of Las Vegas and a person going to Michigan from Las Vegas would proceed east and would not pass that way (RT 202, 208-209). The officer then arrested the respondent for violation of the Henderson Vagrancy Ordinance (RT 199). After the arrest, the officer searched respondent's person and found in the pocket of respondent's coat a pistol with six expended cartridges in the cylinder (RT 209-210). Chaney also testified that he was with respondent when they were arrested in Henderson (RT 171).

On the morning of February 18, 1968, during the post-mortem examination of the body of Mary Parsons, a lead slug was removed from the lung of the body. There was a high degree of similarity of individual striation markings observed during tests between the slug and bullets fired from the gun found on respondent's person. This similarity led Criminalist John Davidson to testify at respondent's trial that the bullets were fired from the same weapon (RT 235-240).

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**REASONS FOR GRANTING THE WRIT**

A majority of the justices of this Court have stated that a state prisoner who has been afforded a fair opportunity in the state courts to raise and has adjudicated his Fourth Amendment claims, which claims do not present a question regarding his innocence, should not be allowed to raise the same claims in collateral proceedings in the federal courts. Nonetheless, the precedents which the lower federal courts



must follow are to the contrary. The writ should be granted to remedy this situation.

The exclusionary rule should not apply to suppress the fruits of a reasonable search incident to an arrest when the arresting officer had probable cause to believe that a then presumptively valid ordinance had been violated. Application of the exclusionary rule in any case to suppress relevant and trustworthy evidence is a high cost to society. That cost is not counterbalanced in this case by the need to deter the arresting officer, since he has done nothing which ought to be deterred. Nor is there a need to deter the legislative body which enacted the ordinance by suppression of the evidence. There is no showing that that body acted in bad faith or for an improper purpose. Similar ordinances were, at the time, in effect in many jurisdictions and had been upheld by the courts. Whatever deterrence deemed necessary could be accomplished by the less drastic means of invalidation of the ordinance and any convictions for its violation. Application of the exclusionary rule is an especially inappropriate remedy when, as here, the arrest occurred in one state for a violation of a local ordinance and the evidence was introduced in a trial in another state for a crime committed in that state. The writ should be granted to enable this Court to decide these important questions of constitutional law regarding application of the exclusionary rule and to settle the apparent conflict among the circuits as to whether the exclusionary rule should apply in such circumstances.

The writ should also be granted to enable the Court to consider the constitutionality of the ordinance in question, if it should find that respondent's Fourth Amendment claim was properly considered by the lower federal courts, and that the exclusionary rule should otherwise apply.

Finally, the writ should be granted to enable the Court to consider whether, in any event, any error here was harmless beyond a reasonable doubt.

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## ARGUMENT

### I

### A STATE PRISONER, WHO HAS BEEN AFFORDED A FAIR OPPORTUNITY IN THE STATE COURTS TO RAISE AND HAVE ADJUDICATED HIS FOURTH AMENDMENT CLAIMS, SHOULD NOT BE ALLOWED TO RAISE THOSE SAME CLAIMS IN COLLATERAL PROCEEDINGS IN THE FEDERAL COURTS WHEN THEY DO NOT PRESENT A QUESTION REGARDING HIS INNOCENCE.

At the present time, a Fourth Amendment claim may be asserted by a state prisoner in a habeas corpus petition filed in a United States District Court under the provisions of Title 28, U.S.C. § 2254. That claim must be considered, and the exclusionary rule applied, in precisely the same manner as a case involving a federal prisoner or a case which is before a federal court on direct review. *Schneckloth v. Bustamonte,* 412 U.S. 218, 251 (1973) (Concurring opinion of Powell, J.). The petitioner persenting such a claim need not allege that he is innocent of the crime for



which he is incarcerated or that the evidence he claims was improperly seized was unreliable. *Id.* at 256-258.

The above cited opinion, which was joined by the Chief Justice and by Mr. Justice Rehnquist, contains a comprehensive and persuasive argument in support of the proposition that, in cases where there is no constitutional claim bearing on innocence, "the inquiry of the federal court on habeas review of a state prisoner's Fourth Amendment claim should be confined solely to the question whether the defendant was provided a fair opportunity in the state courts to raise and have adjudicated the Fourth Amendment claim" *Id.* at 266. Without attempting to elaborate on the reasoning of this opinion we urge the Court to adopt it as a statement of the proper scope of federal review of Fourth Amendment claims raised by state prisoners on habeas corpus. In doing so, this Court must of necessity overrule or limit some of its earlier precedents, e.g., *Kaufman v. United States,* 394 U.S. 217, 225-226 (1969).[3] This is an unavoidable necessity

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[3]A majority of this Court has, *sub silentio,* already limited *Kaufman.* In *Tollett v. Henderson,* 411 U.S. 258 (1973), this Court held that a state prisoner who entered a guilty plea could not, in a subsequent federal habeas corpus proceeding, raise independent claims regarding alleged deprivation of constitutional rights occurring prior to the plea. In *Mann v. Smith,* 488 F.2d 245 (9th Cir. 1973), *cert. denied,* 415 U.S. 932, the United States Court of Appeals for the Ninth Circuit applied *Tollett* to preclude federal habeas corpus review of a California prisoner's drug conviction, founded on his guilty plea. Prior to entering his plea, the defendant had fully litigated the constitutional propriety of the seizure of the drugs in the California courts and had petitioned this court for a writ of certiorari. *See* California Penal Code section 1538.5; *Mann v. Superior Court,* 3 Cal.3d 1, 88 Cal.Rptr. 380 (1970), *cert. denied,* 400 U.S. 1023. *In dictum,* the Court suggested that the result would be the same even if the defendant had followed an alternate course of procedure under

since, although a majority of this Court is on record as favoring such limitation or overruling of these precedents,[4] they still guide the lower federal courts and will continue to do so until they are forthrightly and finally overruled or limited. This case is a classic illustration of the shortcomings of the present rule and a particularly appropriate one for a grant of a writ of certiorari and, ultimately, adoption by this Court of the concurring opinion of Mr. Justice Powell in *Schneckloth v. Bustamonte.*

California law and reserved presenting the issue to the California appellate courts until after his plea of guilty. *See* California Penal Code section 1538.5 (m); *accord, Sanders v. Craven,* 488 F.2d 478 (9th Cir. 1973); *contra, United States ex rel. Newsome v. Malcolm,* 492 F.2d 1166, 1171 (2nd Cir. 1974), *cert. granted sub nom. Lefkowitz v. Newsome,* 417 U.S. 967; *United States ex rel. Daneff v. Henderson,* 501 F.2d 1180 (2nd Cir. 1974).

[4]In *Schneckloth v. Bustamonte, supra,* at 249, Mr. Justice Blackmun, in a separate concurring opinion, noted his agreement with the views expressed in the dissenting opinion of Justices Harlan and Stewart in *Kaufman, supra,* at 242-243, and his agreement with "nearly all" of the opinion of Justice Powell, the Chief Justice, and Justice Rehnquist in *Schneckloth.* He refrained from joining this latter opinion because he found it unnecessary to reconsider *Kaufman* in order to decide the *Schneckloth* case.

Mr. Justice Stewart, writing the opinion of the Court in *Schneckloth,* also found it unnecessary to resolve this question in that case. *Id.* at 249, n. 38. However, in *Kaufman, supra,* at 242-243, he joined the dissenting opinion of Mr. Justice Harlan, which concluded that there should be no collaterial review of Fourth Amendment claims if the defendant had the opportunity to present the claim and have it determined in direct review proceedings. In *Chambers v. Maroney,* 399 U.S. 42, 54-55 (1969), Mr. Justice Stewart reiterated this position in a separate concurring opinion.



## II

**THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED TO SUPPRESS THE FRUITS OF A SEARCH INCIDENT TO AN ARREST FOR VIOLATION OF A THEN-VALID ORDINANCE WHEN THE ARRESTING OFFICER HAD PROBABLE CAUSE TO BELIEVE THAT THE ARRESTEE HAD VIOLATED THE ORDINANCE.**

The question of whether an exclusionary rule should ever be applied has been and probably will remain a fertile field for judicial and scholarly dispute for many years. Despite this, it is difficult to articulate the rule concisely. Generally, it renders inadmissible any evidence seized in violation of a person's constitutional rights. *See* Kaplan, *The Limits of the Exlusionary Rule,* 26 Stan. L. Rev. 1027, 1029 (1974). Yet the rule is subject to several exceptions and limitations. It applies only when the rights of the particular defendant, and not a third person, have been violated. *Brown v. United States,* 411 U.S. 223 (1973); *Alderman v. United States,* 394 U.S. 165 (1969). It does not apply when illegally seized evidence is used only for impeachment. *Walder v. United States,* 347 U.S. 62 (1954). It does not necessarily apply to exclude evidence which would not have come to light but for the illegal conduct of government agents. Such evidence is still admissible if it has not been developed by exploitation of the "primary illegality." *Wong Sun v. United States,* 371 U.S. 471 (1963). It will not require, on collateral attack, the setting aside of a guilty plea entered on the advice of competent counsel, even though there remains some questions whether the defendant's Fourth Amendment rights

have been violated and whether the resulting seizure of evidence contributed to the decision to plead guilty. *See* cases collected at note 3, *supra.*

Several justifications for the rule have been advanced. The one most often stated is that: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guarantee in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States,* 364 U.S. 206, 217 (1960); *see also, Terry v. Ohio,* 392 U.S. 1, 12-13, 29 (1968); *United States v. Calandra,* 414 U.S. 338, 345 (1974).

The Court of Appeal in the instant case recognized a second justification for the rule—"the imperative of judicial integrity." *See, Elkins v. United States, supra,* at 222-223; *Terry v. Ohio, supra,* at 12-13. Under this theory, courts should not be made a party to lawless invasions of the constitutional rights of citizens and should exclude evidence so obtained lest its admission be understood as approval of the use of lawless means of obtaining evidence. *Terry, supra,* at 13. But even this "judicial imperative" is not an absolute since the courts have not adopted a theory of the exclusionary rule based on a direct connection between violation of an individual's Fourth Amendment rights and application of the exclusionary rule. Kaplan, *op. cit. supra,* at 1030. Rather, this "judicial imperative" appears to be a function of the primary purpose of deterrence of unreasonable, and hence illegal, police conduct by withholding the approval of the courts from evidence so obtained.



Indeed, an absolute approach would be at odds with the very language of the Fourth Amendment itself. That Amendment does not proscribe all searches and seizures—only those that are "unreasonable" and hence unconstitutional. *Go-Bart Importing Co. v. United States,* 282 U.S. 344, 357 (1931). This standard of reasonableness is, of necessity, an objective one. Thus, for example, the fact that an arrest is based on a reasonable and good faith mistake of fact will not require suppression of the fruits of a search incident to that arrest. *Hill v. California,* 401 U.S. 797 (1971).

Rather, application of the exclusionary rule requires a balancing process. Thus, even evidence illegally seized as a result of unreasonable government conduct may sometimes be admitted. "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States v. Calandra, supra,* at 348. The Court in *Calandra* used the standing requirement as an example of "the balancing process implicit in this approach." *Id.*

Applying these principles, there is absolutely no justification for application of the exclusionary rule in the instant case because there was nothing to deter. The only police conduct involved was an arrest made with probable cause to believe a local ordinance was

being violated and a reasonable incidental search of the arrestee.[5] In *Pierson v. Ray,* 386 U.S. 547 (1967), this Court faced a similar fact pattern and an analogous legal question. In that case the plaintiff brought an action under the Civil Rights Act of 1871 (42 U.S.C. § 1983) alleging that some of the defendants,

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[5]There is no theoretical inconsistency in the proposition that, assuming *arguendo* the ordinance in question is unconstitutionally vague, a police officer may still have reasonable cause to believe that the ordinance has been violated. A California court of appeal recently addressed the constitutionality of a nearly identical California statute. Of particular interest is its comparison of the operative provisions of the statute with the standards of *Terry v. Ohio, supra:*

> "The statute is asserted to be unconstitutionally vague. Yet under *Terry v. Ohio,* [*supra*], a peace officer may detain, frisk and interrogate a person whose conduct raises a reasonable suspicion of criminal activity. The standard set out in *Terry* for the exercise of this authority is comparable to the one that brings [the statute] in play. Under *Terry* a peace officer is entitled to act when the information available to him warrants the belief by a man of reasonable caution that official intrusion is appropriate [*Terry, supra,* at 20-21]. Under [the statute] a peace officer is entitled to act when the surrounding circumstances indicate to a reasonable man that the public safety demands identification. We see no essential difference between these two formulations. Each amounts to what Justice Harlan has termed 'articulable suspicion less than probable cause.' [*Terry, supra, at page* 31, concurring opinion of Harlan, J. ——].
>
> Neither is subject to the infirmity of vagueness. Both justify the limited intrusion of temporary detention, followed in the one case by frisk and in the other by request for identification. (Parenthetically we observe that frisk involves greater intrusion into personality than does request for identification.)" *People v. Solomon,* 33 Cal.App.3d 429, 435, 108 Cal.Rptr. 867, 870-71 (1973).

The facts surrounding the arrest have been stated in our Statement of Facts, *supra,* and in the Ninth Circuit's opinion (Appendix A, at page 4, n.2). We submit that an officer confronted with these facts could properly request Powell to identify himself and account for his presence. After hearing the self-contradictory and inherently improbable explanation Powell offered, he had probable cause to believe that he had violated the ordinance and could act accordingly.



police officers, had arrested them under a Mississippi statute later declared to be unconstitutional by this Court. This Court held that the officers could not be held liable in damages for acting under a statute that they reasonably believed was valid, but which would later be held unconstitutional, since they were not required to predict the future course of constitutional law. We, of course, recognize that *Pierson* was a civil action in damages against the arresting officers and not a collateral attack on a conviction. Nonetheless, we submit that the general principle of *Pierson*—that the police should not be punished for making an arrest based on probable cause to believe that a statute had been violated in their presence, when they reasonably and in good faith believe that the statute is valid, even though it may later be decided that it was not—should apply to this case. In short, there is no need or reason to deter the sort of reasonable and proper conduct engaged in by the arresting officer in this case.

The Ninth Circuit attempted to parry this argument by stating that it was inconsistent with a "substantial line" of this Court's cases, e.g., *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973); *Coolidge v. New Hampshire,* 403 U.S. 443, 449-453 (1971); *Sibron v. New York,* 392 U.S. 40, 61-62 (1968); *Berger v. New York,* 388 U.S. 41 (1967). Each of these cases is distinguishable because the statutes involved therein, which were relied on by the arresting officers, dealt directly with the standards and procedures governing searches and did not attempt to define a substantive

crime. In short, each involved legislative encroachment upon Fourth Amendment rights. In such cases, the good or bad faith of the police officers enforcing the statute was irrelevant. The Ninth Circuit dismissed this distinction in a single, cryptic sentence, observing that although, "in form the Henderson ordinance purports to create a substantive offense, in effect it negates the requirement of probable cause, basic to the Fourth Amendment." This, however, overlooks the fact that statutes defining a substantive offense of vagrancy, although phrased in many different ways, have been a part of the common law since the enactment of the Statutes of Labourers by Parliament in 1349 and 1350, more than four centuries prior to the adoption of the Fourth Amendment. *See Papachristou v. City of Jacksonville,* 405 U.S. 156, 161-162 (1973); Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision,* 48 Calif.L.Rev. 557, 560-561 (1961); *See also Note, The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality,* 37 N.Y.U.L. Rev. 102 (1962). Indeed, all of our states have recognized a substantive offense of vagrancy. *Sherry, op. cit. supra,* at 557, n.1. Thus, the court should have addressed the question of whether the arresting officer had probable cause to believe that the ordinance was being violated and should not have assumed or decided that the ordinance itself attempted to define "probable cause" in the abstract.

The court bypassed the question of whether the officer had probable cause to arrest and found that



the exclusionary rule should be applied in this case since, although "the public interest may dictate that the police not be deterred from enforcing statutory law even when it mandates unconstitutional conduct . . . the public interest is served by deterring legislators from enacting such statutes." We submit that such deterrence could be accomplished by invalidating the ordinance and any convictions under it. There is no hint of bad faith or oppressive purpose on the part of the local body which enacted the ordinance which would justify a broader sanction. Indeed, the two cases on which the court placed its greatest reliance (*Papachristou v. City of Jacksonville, supra* and *United States ex rel. Newsome v. Malcolm, supra*) were not decided until several years *after* the arrest in this case. The record is silent as to the date of the enactment of the ordinance. However, in 1960, Professor Sherry, perhaps the leading scholar on the subject, proposed the adoption of a similar statute. *Sherry, op. cit. supra,* at 570-571. In 1967 an ordinance identical to the ordinance in question was upheld as constitutional by the California Court of Appeal. *People v. Weger,* 251 Cal.App.2d 584, 59 Cal.Rptr. 661 (1967) *cert. den.* 387 U.S. 1047. Enactment (or failure to repeal) an ordinance under such circumstances simply is not the sort of legislative conduct which needs to be deterred by a sanction more stringent than the invalidation of any convictions under it. The crowning irony in the application of the exclusionary rule in this case is that the legislators in the Henderson, Nevada City Council will hardly

be deterred by invalidation of a conviction for a murder committed in California.

Indeed, other cases, which the court declined to follow, have reached precisely the opposite result. In *United States v. Kilgen,* 445 F.2d 287 (5th Cir. 1971), the defendant was arrested for vagrancy under an ordinance later held unconstitutionally void for vagueness and overbreadth (*United States v. Kilgen,* 431 F.2d 627 [5th Cir. 1970]). Specifically, he was arrested for violating that part of an ordinance which prohibited "wandering and strolling about from place to place with no lawful purpose or objective" 431 F.2d at 628. On rehearing, the court upheld its earlier decision regarding the unconstitutionality of the statute, but held that Kilgen's post-arrest confession to another charge should not be suppressed.

> "Had Kilgen been convicted for vagrancy, that conviction would necessarily have been reversed when the court held the vagrancy ordinance unconstitutional. But overturning a conviction due to an invalid statute does not automatically render the previous arrest and detention illegal absent some showing that police officials lacked a good faith belief in the validity of the statute. *See Pierson v. Ray,* supra. In the case at hand, the police arrested Kilgen for violating an ordinance which the Supreme Court of Florida and the federal district court, although in disagreement with this court, upheld as constitutional. There is no hint of any abusive police conduct in effecting the arrest or in obtaining the evidence used at the trial for another crime. Neither is there any doubt as to the reliability of the evidence which prompted the conviction. In short, this is a clear case of police officers who, with the utmost regard for the rights of the defendant, carried out their sworn duty to make an arrest and obtain evidence under the law as it then existed. No legitimate interest would be served by excluding the confession to the separate crime . . . because we now find the vagrancy ordinance invalid." 445 F.2d at 289 (footnotes omitted).



In *United States v. Dameron,* 460 F.2d 294 (5th Cir. 1972), *cert. denied,* 409 U.S. 882, overruled on other grounds, 488 F.2d 724 (5th Cir. 1974), the defendant was stopped and arrested for violation of a local reckless driving ordinance and then consented to a search, which uncovered a gun. The court held that:

> "Appellant's frontal assault on the ordinance on vagueness grounds, *see Papachristou v. Jacksonville,* [*supra*], while substantial, is ineffectual. Regardless of the outcome of a direct challenge on vagueness grounds, on which we express no opinion, if appellant's arrest was made in the good faith enforcement of a *then* valid ordinance, a subsequent holding of facial invalidity does not of itself taint appellant's consent to search." *Id.* at 295 (Citations omitted).

Accord *Hamrick v. Wainwright,* 465 F.2d 940 (5th Cir. 1972) (dictum); But *cf. United States ex rel. Newsome v. Malcolm, supra* (holding search to be constitutionally defective because arrest made for violation of a statute which "substituted a mere suspi-

cion for probable cause as the basis for arrest.")[6] *Hall v. United States,* 459 F.2d 831 (D.C. Cir. 1972) (en banc) (holding exclusionary rule applicable to the particular case because the defendant was the first litigant to prevail on a claim that the statute under which he was arrested was constitutionally defective).

We submit that this conflict between the circuits is yet another compelling reason why the writ of certiorari should be granted.

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## III

### THE HENDERSON, NEVADA, VAGRANCY ORDINANCE IS NOT UNCONSTITUTIONALLY VAGUE.

The court of appeal held that the ordinance in question was unconstitutional because it was void for vagueness and encouraged arbitrary and erratic arrests and convictions. This Court has consistently held that lack of precision itself is not offensive to the requirements of due process. Impossible standards are not required. What is required is that the language of the statute conveys sufficiently definite warning as to the conduct proscribed when measured by common understanding and practices. *Miller v. California,* 413 U.S. 15, 27, n.10 (1973); *Roth v. United States,* 354 U.S. 476, 491 (1957); *United States v. Petrillo,* 332 U.S. 1, 7-8 (1947). A statute must be sufficiently

[6]This court granted certiorari in the *Newsome* case on the issue of whether the defendant could seek federal habeas corpus relief at all in view of his guilty plea in the state court. 417 U.S. 967.



explicit to inform those subject to it what conduct on their part will render them liable to its penalties. *Connally v. General Construction Co.,* 269 U.S. 385 (1926). Even if a penal statute is framed so as to require a jury upon occasion to determine a question of reasonableness, it is not too vague to serve as a practical guide to permissible conduct. *United States v. Ragen,* 314 U.S. 513 (1942).

A statute must not, however, forbid or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is not sufficient reason to hold the language of the statute too ambiguous to define a criminal offense. *Miller v. California, supra; United States v. Petrillo, supra.* If the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. *United States v. Harriss,* 347 U.S. 612, 618 (1954). This Court has often expressed its intention to go far to uphold statutes that deal with offenses difficult to define when they are not intertwined with limitations on free expression. *Winters v. New York,* 333 U.S. 507 (1948); *see also, Federation of Labor v. McAdory,* 325 U.S. 450 (1945); *Porter v. Investors Syndicate,* 286 U.S. 461 (1932). In determining the sufficiency of the notice afforded by a statute, the statute must of necessity be examined in the light of the conduct

with which the defendant is charged. *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963).

The similarity of the first element of the offense defined by the Henderson ordinance to the operative provisions of *Terry v. Ohio, supra,* has been discussed at n.5, above. The gravamen of the offense is the refusal to identify oneself and to account for one's presence when requested to do so *(compare* the ordinance in *Papachristou v. City of Jacksonville, supra,* which had no such requirement). As was noted above, a statute will not be struck down as unconstitutionally vague if the defendant's conduct is plainly within it.

The self contradictory and inherently improbable explanation given by the respondent in this case certainly could not fit within any reasonable construction of the language of the ordinance. Accordingly, he may not complain that, as to him, that ordinance was void for vagueness. *See Miller v. California, supra; Palmer v. City of Euclid,* 402 U.S. 544, 545 (1971). The final element of the ordinance, requiring the application of a standard of reasonableness under the circumstances is not unconstitutionally vague. *United States v. Ragen, supra.*[7]

[7]The constitutionality of a similar California statute has repeatedly been upheld by the California courts. *See People v. Solomon,* 33 Cal.App.3d 429, 108 Cal.Rptr. 867 (1973); *People v. Taylor,* 6 Cal.App.3d 51, 85 Cal.Rptr. 497 (1970); *People v. Weger,* 251 Cal. App.2d 584, 59 Cal.Rptr. 661 (1967); *cert. denied,* 389 U.S. 1047; *People v. Bruno,* 211 Cal.App.2d Supp. 855, 27 Cal.Rptr. 458 (1962).



## IV

### EVEN IF THE EVIDENCE WERE ERRONEOUSLY ADMITTED, SUCH ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

*Chapman v. California,* 386 U.S. 18 (1967) held that federal constitutional error may be harmless if the court is able to declare a belief that it was harmless beyond a reasonable doubt. The California court of appeal applied this test and held that any error regarding the admission of the gun into evidence or the receipt of testimony concerning the seizure of the gun was harmless beyond a reasonable doubt. The district court agreed with this conclusion. The Ninth Circuit disagreed. We submit that this Court should reach the same conclusion as did the lower courts.

As is shown by our statement of facts, *supra,* there was no doubt that respondent was present in the liquor store at the time Mrs. Parsons was shot. There was no doubt as to his identity. Nor was there any doubt that he had the murder weapon in his hand during the quarrel with Mr. and Mrs. Parsons. Mr. Parsons testified that respondent seized the gun and shot him. A few seconds later, he heard another shot and heard his wife scream. He then observed that she had been shot. He last saw the gun in respondent's hand, while he was in the store. The gun was not found in the store. Witness Buckley saw him holding the gun and saw Mr. and Mrs. Parsons get shot. His testimony differed from that of Mr. Parsons only in that he testified that the shootings occurred in reverse order (Mrs. Parsons was shot before Mr. Parsons). Witness Mercer observed the struggle but left before the

shots were fired. Witness Chaney also observed respondent in the Parsons' store and saw him grab at the gun in Mr. Parsons' hand. Perhaps the most eloquent testimony to the fact that respondent succeeded in wresting the gun from Mrs. Parsons is the fact that Mr. Parsons received a gunshot wound on his right wrist. We submit that this evidence can give rise to no reasonable conclusion other than that respondent had exclusive possession of the weapon and fired the shots that killed Mrs. Parsons and wounded her husband. Accordingly, we submit that any error with reference to the gun was clearly harmless beyond a reasonable doubt.

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**CONCLUSION**

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated, February 21, 1975.

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**(Appendices Follow)**

# APPENDICES

**Appendix A**

United States Court of Appeals
for the Ninth Circuit

No. 72-1543

Lloyd Charles Powell, Plaintiff-Appellant,
vs.
W. T. Stone, Warden, Defendant-Appellee.

[December 4, 1974]

Appeal from the United States District Court
for the Northern District of California

## OPINION

Before: MERRILL and BROWNING, Circuit Judges, and TAYLOR,* District Judge.

BROWNING, Circuit Judge:

Late one night appellant and three companions became involved in an altercation in the Bonanza Liquor Store in San Bernardino, California. Mary Parsons, wife of the manager, Gerald Parsons, was shot and killed. Ten hours later, appellant was arrested in Hen-

*Honorable Fred M. Taylor, United States District Judge, District of Idaho, sitting by designation.

derson, Nevada, for violation of a local vagrancy ordinance. Testimony regarding this arrest and the discovery of the murder weapon in appellant's jacket pocket, in a search incident to the arrest, was introduced in appellant's subsequent trial for murder in the Superior Court of San Bernardino County. The California trial court rejected appellant's objection that the evidence should have been excluded because the Henderson vagrancy ordinance was unconstitutional and the arrest and search incident thereto were therefore illegal. Appellant was convicted of second-degree murder.

The conviction was affirmed by the California District Court of Appeal. That court did not pass upon the constitutionality of the Henderson ordinance or the legality of the arrest and search; it affirmed on the ground that admission of the evidence, if error, was harmless under the test of *Chapman v. California,* 386 U.S. 18 (1967). The Supreme Court of California denied appellant's petition for habeas corpus.

Appellant then filed the present petition for habeas corpus in the federal district court. The district court denied the petition. The court did not reach the constitutionality of the Henderson vagrancy ordinance. It agreed with the California District Court of Appeal that the admission of the evidence was harmless beyond a reasonable doubt. It also held that even if the Henderson ordinance were determined to be unconstitutional, the exclusionary rule should not be applied to bar admission of the fruits of the search incident to the otherwise valid arrest.



For reasons that will be set out later, we are unable to agree that admission of the evidence was harmless. We must therefore consider whether its admission was error. We conclude that it was.

## I

We turn first to the constitutionality of the Henderson vagrancy ordinance. The ordinance reads:

> Every person is a vagrant who:
>
> Loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by a police officer to do so if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

This ordinance, like the vagrancy ordinance held unconstitutional in *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972), "is void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' *United States v. Harriss,* 347 U.S. 612, 617, and because it encourages arbitrary and erratic arrests and convictions. *Thornhill v. Alabama,* 310 U.S. 88; *Herndon v. Lowry,* 301 U.S. 242."

The offense under the Henderson ordinance has three elements: (1) "loiter[ing] or wander[ing] upon the streets . . . without apparent reason or business," (2) "refus[ing] to identify himself and to account for his presence," and (3) "surrounding circumstances

. . . such as to indicate to a reasonable man that the public safety demands such identification."

The language of the first element is the same in substance as the language of the Jacksonville ordinance held invalid in *Papachristou:* "[P]ersons wandering or strolling around from place to place without any lawful purpose or object . . . shall be deemed vagrants." 405 U.S. at 156-57 n. 1.[1]

This language, the Supreme Court held, fails to give fair notice of the prohibited conduct to a possible offender, encompasses innocent activity that is part of the amenities of life in a free society, provides no guidelines by which enforcement authorities might distinguish between innocent and unlawful conduct, allows arrest and conviction on suspicion, places almost unfettered discretion in the hands of the police, and invites arbitrary and erratic application. If there is any material difference between the Jacksonville ordinance and the first element of the Henderson ordinance, the latter is more subject to these criticisms than the former.

The remaining two elements of the Henderson ordinance do not add significant specificity.

Assuming the phrase "to identify himself" is clear enough, one who properly identifies himself when asked would still violate the ordinance if he refused upon request "to account for his presence"—a phrase that reflects all of the deficiencies and is subject to all

[1]A similarly phrased Arizona statute was held plainly unconstitutional in Anderson v. Nemetz, 474 F.2d 814, 817 (9th Cir. 1973).



of the abuses that underlie the ruling in *Papachristou. See Ricks v. District of Columbia,* 414 F.2d 1097, 1104-05 (D.C. Cir. 1968); *Baker v. Bindner,* 274 F.Supp. 658, 664 (W.D. Ky. 1967); *United States v. Margeson,* 259 F.Supp. 256, 268-69 (E.D. Pa. 1966). The statutes involved in these three cases predicated criminality upon the offender's failure to give a "good" or "satisfactory" account of his presence. This condition is not explicitly stated in the Henderson ordinance, but it is clearly implied. Appellant offered an explanation of his conduct; he was arrested because the officer did not believe it.[2]

The third element of the offense under the Henderson ordinance—that "surrounding circumstances . . .

[2]The arresting officer saw appellant and a companion walking across a parking lot in a shopping center. It was 10 o'clock Sunday morning. The adjacent stores were open and there were cars on the lot. The arresting officer knew nothing of the shooting in California the night before. There is nothing to suggest that he connected appellant with any other specific crime. He testified that appellant and his companion "appeared" to look at the police car, then "quickly" turned and walked in the opposite direction. They walked "in a rather rapid manner," occasionally looking back. When the police car turned and followed, the two men separated and walked in different directions. The officer followed appellant, and honked the patrol car horn. Appellant did not stop. The officer got out of his car and said, "Wait a minute." Appellant stopped. The officer asked if appellant had any identification. Appellant said he did not, that it had recently been stolen. The officer asked his name; appellant gave it. The officer asked appellant where he was staying. Appellant responded that he was staying with friends in Las Vegas (approximately eight miles north of Henderson), but he could not provide the name or address. The officer asked appellant where he was going. Appellant said he was en route to Michigan; the officer testified that Henderson is south of Las Vegas and not east on the most direct road to Michigan. He arrested appellant because appellant "had no real answer as far as where he had been staying nor the friends that he was with nor could [he] give me a reason for being in the Henderson area. . . ." After the arrest the officer conducted the search complained of.

indicate to a reasonable man that the public safety demands such identification"—cannot save the ordinance. Whether "public safety demands . . . identification" is far too amorphous a standard to provide either reasonable notice to the possible offender (who, indeed, may not be aware of the circumstances that implicate the public safety), or a sufficiently specific standard to guide the police. A similar, but less vague, limitation ("circumstances which justify suspicion that [a person] may be engaged or about to engage in crime") was found constitutionally inadequate in *United States ex rel. Newsome v. Malcolm,* 492 F.2d 1166, 1173 (2d Cir. 1974).

From this analysis, it is clear that the Henderson vagrancy ordinance is incompatible with Fifth Amendment due process notice requirements incorporated in the Fourteenth Amendment. It should be emphasized that the ordinance is also incompatible with incorporated Fourth Amendment principles. A vagrancy ordinance of this kind "conflict[s] with the deeply rooted Fourth Amendment requirement that arrests must be predicated on probable cause." *United States ex rel. Newsome v. Malcolm, supra,* 492 F.2d at 1172. *See also Papachristou, supra,* 405 U.S. at 169-70; *Hall v. United States,* 459 F.2d 831 (D.C. Cir. 1972) *(en banc), noted in* 47 N.Y.U. L. Rev. 595 (1972) *and* 18 Vill. L. Rev. 117 (1972).

As these authorities reflect, such a vagrancy ordinance subverts the "probable cause" requirement in two ways. It authorizes arrest and conviction for conduct that is no more than suspicious. A legislature



could not reduce the standard for arrest from probable cause to suspicion; and it may not accomplish the same result indirectly by making suspicious conduct a substantive offense. Vagrancy statutes do just that, for they authorize arrest and conviction for the vagrancy offense if there are reasonable grounds to suspect that the accused may have committed, or if left at large will commit, a more serious offense. Police are duty-bound to investigate suspicious conduct, and founded suspicion will support an investigative stop and inquiry. *Wade v. United States,* 457 F.2d 335, 336 (9th Cir. 1972). But more is required to justify arrest. *Henry v. United States,* 361 U.S. 98, 101, 104 (1959).[3]

The "probable cause" requirement is negated by such vagrancy ordinances in a second way. Their language is so general and vague, the elements of the offense so obscure, that they afford no reasonable criteria by which an officer may determine whether the ordinance has or has not been violated. Because a man of reasonable caution cannot form a reasonable belief as to whether such an ordinance has been violated, an officer cannot "gauge justification for [vagrancy] arrests consistently with Fourth Amendment principles." *Hall v. United States, supra,* 459 F.2d at 837.

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[3]It is not contended that the search in this case could be justified as a protective search for weapons; or that prior to the search the arresting officer had no reason to believe appellant was "an armed and dangerous individual." Terry v. Ohio, 392 U.S. 1, 27 (1968).

## II

The question remains whether the evidence obtained in the search incident to appellant's arrest under the unconstitutional Henderson ordinance should have been excluded at his murder trial.

Appellee argues that the purpose of the exclusionary rule is to discourage objectionable police conduct, and this purpose would not be advanced by excluding the fruits of a search that appeared to be lawful when made. The crux of the contention is that the public interest is not served by deterring officers from enforcing a statute that is apparently valid. Appellant relies upon the principle underlying the holding in *Pierson v. Ray,* 386 U.S. 547 (1967), that police officers cannot be held liable for damage for an arrest made in good faith and on probable cause under a statute they reasonably believed to be valid.[4]

Extension of *Pierson v. Ray* to allow admission of evidence obtained in the search incident to appellant's arrest for violation of an ordinance invalid under the Fourth Amendment would be inconsistent with a substantial line of Supreme Court authority. *See, e.g., Almeida-Sanchez v. United States,* 413 U.S. 266 (1973); *Coolidge v. New Hampshire,* 403 U.S. 443, 449-53 (1971); *Sibron v. New York,* 392 U.S. 40, 61-62 (1968); *Berger v. New York,* 388 U.S. 41 (1967).

[4]Appellee also contends that failure to apply the rule should not afford a basis for collateral attack upon a state conviction in federal court. He submits the contention "for the record," recognizing that it is contrary to recent precedent. E.g., Whiteley v. Warden, 401 U.S. 560 (1971); Mancusi v. DeForte, 392 U.S. 364 (1968); Ramon v. Cupp, 423 F.2d 248 (9th Cir. 1970). The Supreme Court explicitly approved the doctrine in Kaufman v. United States, 394 U.S. 217, 225 (1969), citing it as one basis for holding that failure to exclude evidence obtained in violation of the defendant's Fourth Amendment rights is a ground for collateral attack upon a *federal* conviction.

The issue was before the Court, but was not reached, in Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring).



In each of these cases except *Sibron* the exclusionary rule was applied to bar evidence obtained in good-faith reliance upon a statute later held to violate Fourth Amendment principles. In *Almeida-Sanchez,* marijuana found in a search of defendant's automobile without a warrant, probable cause, or consent was suppressed although a federal statute authorized government agents to conduct such searches for aliens within a reasonable distance of the border. In *Coolidge,* evidence obtained in an automobile search conducted by a police officer pursuant to a warrant issued by the Attorney General of the state was suppressed because the warrant was not issued by a "neutral and detached magistrate," as required by the Fourth Amendment, even though a state statute authorized the issuance of the warrant. In *Berger,* evidence obtained by electronic eavesdropping authorized in accordance with the state statute was excluded because the statutory procedures did not satisfy Fourth Amendment requirements that a warrant be issued only on showing that a specific crime has been or is being committed, and "particularly describing the place to be searched, and the persons or things to be seized." In *Sibron,* evidence obtained in a search assertedly conducted in accordance with a state "stop-and-frisk" statute was excluded on Fourth Amend-

ment grounds with an express disclaimer by the Court of any need to inquire whether the state statute was valid or had been complied with.

The statutes involved in these cases dealt directly with the standards and procedures governing searches. But as noted earlier, though in form the Henderson ordinance purports to create a substantive offense, in effect it negates the requirement of probable cause, basic to the Fourth Amendment.

The exclusionary rule was applied to bar evidence obtained in searches incident to good-faith arrests under invalid vagrancy statutes in both *United States ex rel. Newsome v. Malcolm, supra,* 492 F.2d at 1174, and *Hall v. United States, supra,* 459 F.2d at 841. The reason suggested in *Newsome* is that the search-incident-to-arrest exception is justified only because probable cause is required for the arrest, and since this essential Fourth Amendment safeguard is lacking in arrests under a vagrancy ordinance, searches incident to such arrests are also unsupported by probable cause and are therefore invalid. This explains the invalidity of the search, but it does not offer a rationale for the exclusion of the evidence. Neither does the opinion in *Hall. Hall* found it unnecessary to decide whether the exclusionary rule should apply to the fruits of all searches incident to arrests under unconstitutional statutes. The Court concluded that at least, for the reasons suggested in *Stovall v. Denno,* 388 U.S. 293, 301 (1967), the exclusionary rule should be applied where the defendant was the first to success-



fully challenge a search on the new constitutional ground, as was the case in *Hall.* In view of *Papachristou, Newsome,* and *Hall,* however, it is far from clear that appellant could qualify as a constitutional innovator.

Two considerations clearly support the application of the exclusionary rule to this case. It may not be appropriate to fault an officer for making an arrest in mere suspicion, contrary to well-established Fourth Amendment principles, when such an arrest is authorized by a statute *(but see* Note, *supra,* 18 Vill. L. Rev. at 121 n. 33),[5] but the same cannot be said with respect to those who enact such a statute authorizing such unconstitutional searches. The public interest may dictate that the police not be deterred from enforcing statutory law even when it mandates unconstitutional conduct, but the public interest is served by deterring legislators from enacting such statutes. *See* Note, *supra,* 47 N.Y.U. L. Rev. 602, 604. In the second place, application of the exclusionary rule "serves another vital function—'the imperative of judicial integrity.' *Elkins v. United States,* 364 U.S. 206, 222 (1960). Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." *Terry v. Ohio, supra,* 392 U.S. at 12-13.

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[5]The fact that the officer acted in good faith does not validate the search or dictate admission of the evidence seized. Beck v. Ohio, 379 U.S. 89, 97 (1964); Henry v. United States, 361 U.S. 98, 102 (1959). *See also* Whiteley v. Warden, 401 U.S. 560, 568 (1971).

The holdings in *United States v. Kilgen,* 445 F.2d 287, 289 (5th Cir. 1971), and *United States v. Dameron,* 460 F.2d 294 (5th Cir. 1972), are not to the contrary. Both involved consent searches rather than searches incident to arrest. They hold only that invalidation of the underlying substantive statute does not vitiate the consent to search.

## III

Finally, we state the basis for our conclusion that admission of the evidence obtained in the unlawful search was not harmless beyond a reasonable doubt.

Shortly after appellant and his three companions entered the liquor store, Mr. and Mrs. Parsons saw appellant conceal a bottle of wine under his coat. They demanded payment. Appellant denied having the wine. Mrs. Parsons gave her husband a gun, which Mr. Parsons pointed at appellant. A struggle ensued involving appellant, Mr. Parsons and Mrs. Parsons. Three shots were fired: the first, admittedly fired by Mr. Parsons, went into the ceiling; the second and third wounded Mr. and Mrs. Parsons, Mrs. Parsons fatally. Mr. Parsons testified that after the first shot was fired appellant obtained control of the gun and Mr. Parsons ran to get another, leaving appellant and one of his companions, Fred Buckley, with Mrs. Parsons. Mr. Buckley first testified that appellant and Mr. Parsons were "wrestling with the gun" and that he "can't rightly say who had the gun" when the fatal shot was fired; he later testified that he "believed" appellant had the gun.



The defense submitted to the jury all of the theories suggested by the facts, including self-defense, justifiable homicide, accident, and that the fatal shot was not fired by appellant.

In rebuttal the prosecutor made effective use of the testimony regarding the Nevada arrest and search. He refuted the theory of accident by demonstrating to the jury the time and effort required to pull the trigger and discharge the murder weapon, and by inviting the jury to try it themselves, commenting, "It doesn't fire accidentally and it doesn't hit people accidentally either." The prosecutor used appellant's possession of the gun in responding to the defense argument that in order to find that appellant shot the victim the jury would have to rely entirely on the testimony of Mr. Buckley, an accomplice whose credibility had been severly attacked. The prosecutor noted Mr. Parsons' testimony that when he returned to the room and found his wife shot, Mr. Buckley alone was present; and, as the prosecutor pointed out, Mr. Buckley did not have the gun. The murder weapon, the prosecutor emphasized, was found "in the possession of this defendant in Henderson, Nevada." Thus, the fact that appellant had possession of the gun the next morning may have been crucial, for it virtually eliminated the possibility that Mr. Buckley or another of appellant's companions could have picked up the gun during the scuffle and shot Mrs. Parsons. Appellant's possession of the gun also supported the inference that he was not merely struggling with Mrs. Parsons for possession of the gun when she was shot

but had the gun in his control. Finally, the prosecutor pointed out that when the gun was found on appellant's person, all six shells had been expended, and since only three shots were fired from this gun in the store, the inevitable inference was that appellant had fired the three remaining shots after his flight from the liquor store and before his arrest. The effect of the testimony of appellant's arrest for vagrancy in another state while in possesion of the murder weapon with three bullets missing was to picture appellant as an evil and violent man.[6]

Both the California District Court of Appeal and the court below concluded that in light of other evidence in the record, the testimony regarding appellant's possession of the murder weapon in Nevada "was not required to establish any element of the crime charged." That is not the test. The question is whether it is "[ ]possible for us to say that the State has demonstrated, beyond a reasonable doubt, that the [admission of the unlawfully seized evidence] did not contribute to [appellant's] conviction[]." *Chapman v. California, supra,* 386 U.S. at 26. In good conscience, we are unable to do so.

The judgment is reversed and the cause remanded to the district court for further proceeding consistent with this opinion.

[6]The prosecutor also argued to the jury that appellant's presence in Nevada soon after the offense was evidence of flight reflecting consciousness of guilt. But as the state court and the court below point out, the arresting officer's knowledge of appellant's presence in Nevada was not the product of either the arrest or the search.



**Appendix B**

United States District Court
Northern District of California

No. C70-1497 LHB

Lloyd Charles Powell, Petitioner,
vs.
W. T. Stone, Warden, Respondent.

[Filed February 8, 1972]

ORDER

Petitioner, a California state prisoner incarcerated at the Correctional Training Facility, Soledad, California, was convicted of violation of California Penal Code section 187 (second degree murder) following a trial by jury in the Superior Court of San Bernardino County. His conviction was affirmed on appeal by the California Court of Appeal (4/Crim. 3388, unpublished opinion). A petition for a writ of habeas corpus was denied by the California Supreme Court.

On July 15, 1970, petitioner filed a petition for a writ of habeas corpus in this Court (No. C-70 1497 GSL). On September 17, 1970, the late Judge Levin denied the petition. An appeal from this order was dismissed by the Court of Appeals for the Ninth Cir-

cuit on July 15, 1971 (9th Cir. No. 26782). That court gave petitioner leave to file an amended petition in this Court. The present petition was filed on August 24, 1971.

The trial court found petitioner guilty of second degree murder for fatally shooting one Mary Parsons at approximately midnight on February 18, 1968, in San Bernardino, California. Approximately 10 hours later, petitioner and a companion were arrested in Henderson, Nevada, for violation of the local vagrancy ordinance. After the arrest, the arresting officer searched petitioner's person and found a pistol containing six expended cartridges in his coat pocket. At petitioner's trial, expert testimony was admitted which demonstrated that the bullet which killed Mrs. Parsons was fired from this gun.

Petitioner now seeks relief on habeas corpus on the ground that: (1) the ordinance under which he was arrested is unconstitutionally vague and requires a person suspected of violating it to incriminate himself; (2) even if the ordinance is not constitutionally infirm, the officer did not have probable cause to arrest petitioner for violation of it. Petitioner further contends that any error with reference to the admission of the gun or of the arresting officer's testimony concerning the circumstances of the arrest cannot be said to be harmless beyond a reasonable doubt.

Our initial inquiry is whether, if the statute under which petitioner was arrested is unconstitutional, the exclusionary rule would operate to render the fruits of a search incident to the arrest inadmissible at his



trial. The purpose of the exclusionary rule is to discourage illegal police conduct by removing the incentive to disregard the constitutional guaranty against unreasonable searches and seizures. *Mapp v. Ohio,* 367 U.S. 643, 656 (1961); *Elkins v. United States,* 364 U.S. 206, 217 (1960). Evidence seized under such circumstances is not necessarily untrustworthy. In the present case, it does not appear that petitioner was prosecuted for violation of the vagrancy ordinance. He now attacks the product of the search, the gun which was admitted into evidence at his trial in California, and not the arrest itself. The discovery of this evidence was an unforeseen and collateral byproduct of the officer's action in arresting petitioner for violation of the ordinance. The purpose of the exclusionary rule would not be advanced by ex post facto condemnation of an arrest which was apparently valid when made. The statute in question is possessed of sufficient clarity to warrant the arresting officer's conclusion that petitioner had violated it. Therefore, in the absence of a prior determination that the statute was unconstitutional, the officer was entitled to arrest petitioner for violation of it if he had probable cause to believe that the offense had been committed in his presence and to make a reasonable search incident to that arrest.

The facts developed at petitioner's trial show that the arresting officer had probable cause to believe that he had observed petitioner violate the ordinance. The ordinance provides that every person is a vagrant who:

> "Loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by a police officer to do so if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

At the time of the arrest, the officer was in uniform and was driving a marked police vehicle. He observed petitioner and another man looking at the police unit. After they had observed the police car, they quickly turned and walked rapidly in the opposite direction. As they were walking, they glanced back at the police car. The officer then followed them. They again glanced back at the police car, then split apart and began walking rapidly in different directions. The officer followed petitioner and directed him to halt. Petitioner failed to do so and continued walking rapidly. The officer finally stepped from his vehicle and asked petitioner to stop. Petitioner identified himself by his correct name and told the officer that he had been staying with friends in the Las Vegas area for the past several days and that he was en route to Michigan. Petitioner failed to produce any identification and stated that it had recently been stolen from him. Petitioner was unable to name his friends in Las Vegas or their address. The officer testified that the City of Henderson is not in a direct route from Las Vegas to Michigan. These facts combined to give the officer probable cause to believe that he had observed petitioner violate the ordinance. Accordingly, arrest for violation of the ordinance and a reasonable search incident to that arrest were proper. The gun seized from petitioner's coat during that search was, therefore, properly admitted into evidence at petitioner's trial in California.



In any event, it appears that, even if the admission of the gun and of the arresting officer's testimony into evidence at petitioner's trial constituted error, such error was harmless beyond a reasonable doubt under the rule of *Chapman v. California,* 386 U.S. 18 (1967). The California Court of Appeal, in affirming petitioner's conviction on direct appeal, reached a similar conclusion and thus avoided decision of several of the other constitutional issues presented to it. That court's decision in this respect is, of course, not binding on this Court. *Fay v. Noia,* 372 U.S. 391, 422 (1963). This Court has, therefore, independently reviewed the transcripts of petitioner's trial, which were filed with this Court as exhibits. I find that these transcripts are sufficient to serve as a basis for determination of the issues presented. 28 U.S.C. § 2254. Having read and considered these transcripts, I conclude that any error concerning the above evidence was harmless error under the *Chapman* test. It clearly appears from independent evidence adduced at the trial to which no objection has been made that petitioner was present at the scene of the shooting and became embroiled in an argument with the decedent and her husband. Two witnesses testified that he was in possession of the gun immediately before the fatal shot was fired. No evidence to the contrary was pre-

sented. Petitioner's presence in Nevada a short time after the shooting could be construed as evidence of flight. Any irregularities surrounding the arrest and search would not taint the testimony of the two witnesses who observed him in Nevada on the morning following the shooting. Thus, petitioner's possession of the gun at the time of the commission of the offense was conclusively proven without recourse to any inferences which could have been drawn from his later possession of the gun in Nevada. As noted by the California Court of Appeal, petitioner's possession of the gun in Nevada was not required to establish any element of the crime charged. I therefore find that any possible error committed in the admission into evidence of the gun or the arresting officer's testimony was harmless beyond a reasonable doubt.

It is therefore .

ORDERED that the petition for writ of habeas corpus be denied, that the order to show cause heretofore issued be discharged, and that the proceedings be dismissed.

Dated: Feb. 8, 1972

Lloyd H. Burke

United States District Judge



## Appendix C

**CERTIFIED FOR NONPUBLICATION**

*In the Court of Appeal*
*State of California*
*Fourth Appellate District*

DIVISION TWO

4 Criminal No. 3388

People of the State of California,
Plaintiff and Respondent,
vs.
Lloyd Charles Powell,
Defendant and Appellant.

[Filed Oct. 7, 1969]

### OPINION

APPEAL from a judgment of conviction of violation of Penal Code, § 187 (Murder), entered in the Superior Court in and for the County of San Bernardino. Edward P. Fogg, Judge. Judgment affirmed.

Richard R. Beswick, under appointment by this Court of Appeal, for Defendant and Appellant.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and Jeffrey T. Miller, Deputy Attorney General, for Plaintiff and Respondent.

In an information filed by the district attorney for the County of San Bernardino on March 8, 1968, defendant Powell was charged with a violation of Penal Code, § 187, (Murder). Defendant entered a plea of "Not Guilty," and prior to trial withdrew his reservation of the right to make an additional plea of "Not Guilty by Reason of Insanity." At the conclusion of a jury trial, defendant was found guilty of the crime of murder in the second degree. Defendant waived referral of his action to the probation office for presentence investigation and report, declined the statutory time for sentence, and requested immediate sentence. The court sentenced Powell to imprisonmnt in the state prison for the term prescribed by law. This is an appeal from the judgment.

Defendant does not question the sufficiency of the evidence, therefore, no detailed statement of the facts is necessary. Only that portion of the evidence which is relevant to defendant's contentions will be recited.

In the very early hours of February 18, 1968, the charged crime was committed in a liquor store in San Bernardino County, California. Approximately ten hours later defendant was arrested in the City of Henderson, Nevada, for a violation of its local vagrancy ordinance. After the arrest, defendant was searched and a gund was removed from a pocket in



the jacket which he was wearing. The gun was introduced into evidence in the case now at bench.

On this appeal, defendant attacks the constitutionality of the Henderson, Nevada, ordinance contending it violates the First, Fourth, Fifth and Fourteenth Amendments to the Federal Constitution. It is not necessary for us to determine the constitutionality of the Henderson ordinance or the legality of the Nevada officer's arrest of defendant.

It has been repeatedly and consistently held that the requirements of due process are satisfied if the defendant is given a fair trial, although brought to trial against his will. Even though the arrest was illegal or the extradition proceedings were irregular or defendant was kidnaped in a sister state, the court in which the defendant is present and which has jurisdiction of the charged crime has proper jurisdiction of defendant's person. (*Frisbie v. Collins,* 342 U.S. 519 [72 S.Ct. 509, 96 L.Ed. 541]; *Ker v. Illinois,* 119 U.S. 436 [7 S.Ct. 225, 30 L.Ed. 421]; *People v. Garner,* 57 Cal. 2d 135; *People v. Pratt,* 78 Cal. 345; *People v. Stoliker,* 192 Cal.App. 2d 263; *People v. Sergent,* 183 Cal.App. 2d 342; see Witkin, Crim.Proc., § 46, p. 48.)

Defendant does not contend that officials of the State of California lacked probable cause to have him arrested or extradited, nor does he allege any irregularity in his return to California.

The ramifications of the possible constitutionality of the Henderson ordinance are not entirely resolved

since evidentiary fruits of the arrest were introduced at the trial; the Nevada officer testified as to the arrest, the identification of the defendant and his possession of the murder weapon.

Defendant's presence in Nevada within ten hours of the homicide could be construed as evidence of flight. However, any person in Nevada who saw defendant at or about the time the Nevada officer encountered him could have testified as to identification and his presence in Nevada. Any irregularities surrounding the arrest would not taint the officer's testimony regarding defendant's presence in Henderson. At the trial the Nevada officer also testified that the murder weapon was found in defendant's possession at the time of his arrest. The gun itself was introduced into evidence without objection; defendant cannot question the admissibility of the gun for the first time on appeal. However, defendant did object to the testimony of the Nevada officer concerning the circumstances surrounding the gun's discovery. Although this latter point is different in substance from the former one, in essence the objection raises the issue of whether the method by which the gun was discovered was legal. If the method by which the gun came into the possession of law enforcement officers were impermissible, the taint, if any, might prevent the gun being admissible into evidence.

However, assuming that the objection which was made went to the admissibility of the gun and that it was error to admit the gun into evidence, we cannot find reversible error. The evidence of the events surrounding the commission of the offense clearly places the defendant at the scene of the crime, and identifies him as the person who fired the fatal shot. Even under the stringent test of *Chapman v. California,* 386 U.S. 18 [87 S.Ct. 824], the error was non-prejudicial. The testimony of the Nevada officer, regarding defendant's possession of the murder weapon in Nevada, was not required to establish any essential element of the charged crime.



Mr. Buckley accompanied defendant to the liquor store where the homicide occurred and was present during the time the crime was committed. He testified for the prosecution. Shortly after the events at the County Hospital, Mr. Buckley gave a statement to law enforcement officers. In that statement, Mr. Buckley stated that defendant "shot the manager's wife, and, then, the manager." During his testimony at trial, Mr. Buckley stated he could not say he actually saw the gun in defendant's hand at any time. The prosecution sought to impeach Mr. Buckley with his prior inconsistent statements. No objection to this testimony was entered by defendant in the trial court forum. On appeal, defendant for the first time asserts the prior inconsistent testimony should not have been admitted.

The holdings of *People v. De Santiago,* 71 A.C. 18, and *People v. Pineda,* 253 Cal.App. 2d 443, are dispositive of this contention. The admissibility of evidence of the type here involved will not be reviewed on appeal absent a specific and timely objection at trial. (*People v. Robinson,* 62 Cal. 2d 889, 894; *People*

*v. Richardson,* 51 Cal. 2d 445, 447; *People v. Kitchens,* 46 Cal. 2d 260, 262.)

Judgment affirmed.

McCabe P.J.

We concur:

Kerrigan J.

Tamura J.

Certified for nonpublication, Rule 976.

McCabe P.J.

Kerrigan J.

Tamura J.

Supreme Court, U. S.
FILED
AUG 29 1975
MICHAEL RODAK, JR., CLERK

# APPENDIX

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1975

## No. 74-1055

W. T. STONE,
*Petitioner,*

vs.

LLOYD CHARLES POWELL,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

**Petition for Certiorari Filed February 22, 1975**
**Certiorari Granted June 30, 1975**

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**CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES**

June 6, 1968—Conviction by a jury after trial in the Superior Court of San Bernardino County, California of murder in the second degree in violation of California Penal Code section 187.

June 10, 1968—Sentence to the California State Prison for the term prescribed by law (five years to life).

October 7, 1969—Affirmance of the judgment of conviction by the California Court of Appeal, Fourth Appellate District, Division Two (4 Criminal No. 3388).

July 1, 1970—Denial by the California Supreme Court of respondent's petition for writ of habeas corpus.

July 15, 1970—Respondent's petition for writ of habeas corpus filed in the United States District Court for the Northern District of California.

September 17, 1970—Order filed denying petition for writ of habeas corpus.

October 28, 1970—Order filed granting a certificate of probable cause to appeal to the United States Court of Appeals for the Ninth Circuit.

May 2, 1971—Appellant's Opening Brief filed.

June 2, 1971—Appellee's Brief filed.

July 15, 1971—Appeal from order denying petition for writ of habeas corpus dismissed by United States Court of Appeals pursuant to stipulation of counsel.

August 24, 1971—Amended petition for writ of habeas corpus filed in the United States District Court.

BEST COPY AVAILABLE

November 1, 1971—Order to Show Cause issued.

January 14, 1972—Return to Order to Show Cause filed.

January 26, 1972—Traverse to the Return to the Order to Show Cause filed.

February 8, 1972—Order filed denying the petition for writ of habeas corpus.

February 22, 1972—Order filed granting certificate of probable cause to appeal.

May 3, 1972—Appellant's Opening Brief filed in the United States Court of Appeals for the Ninth Circuit.

June 2, 1972—Appellee's Brief filed.

February 14, 1973—Submission of cause vacated pending the decision of the United States Supreme Court in *Schneckloth v. Bustamonte,* No. 71-732, *certiorari granted,* 405 U.S. 953 (1972); *decided* 412 U.S. 218 (May 29, 1973).

May 29, 1973—Cause taken under submission.

December 4, 1974—Opinion and judgment filed reversing the judgment of the District Court and remanding to the District Court for further proceedings.

December 30, 1974—Order filed staying issuance of mandate to January 4, 1975, under Rule 41(a) of the Federal Rules of Appellate Procedure.

January 22, 1975—Order filed staying issuance of mandate to February 3, 1975, under Rule 41(a).

January 22, 1975—Order filed denying Respondent's motion for enlargement pending review.



February 4, 1975—Order filed staying issuance of mandate to February 17, 1975, under Rule 41(a).

February 20, 1975—Order filed staying issuance of mandate to February 25, 1975, pursuant to Rule 41(a).

February 22, 1975—Petition for writ of certiorari in the United States Supreme Court docketed.

March 7, 1975—Respondent's motion for leave to proceed *in forma pauperis* filed.

April 2, 1975—Order of Mr. Justice Douglas denying respondent's motion for enlargement pending review filed.

June 30, 1975—United States Supreme Court grants motion of respondent for leave to proceed *in forma pauperis* and the petition for writ of certiorari.

Superior Court of the State of California
for the County of San Bernardino

No. CR-21427

The People of the State of California,
Plaintiff,

vs.

Lloyd Charles Powell,
Defendant.

REPORTER'S TRANSCRIPT

Before Hon. Edward P. Fogg, Judge, Department IV (With Jury) San Bernardino, California, May 29, 31, June 3, 5, 1968

*Appearances:*

For the Plaintiff:
Kenneth L. Pike, Esq.
Chief Trial Deputy District Attorney
Room 200, Court House
San Bernardino, California

For the Defendant:
Holcomb, Ward & Foley
Attorneys at Law
By: Edward P. Foley, Esq.
505 North Arrowhead Avenue
San Bernardino, California



**[194]** *Edward R. Lattin,* called as a witness by and in behalf of the People, having been duly sworn, testified as follows:

*Direct Examination*

By Mr. Pike:

Q. And your business or occupation, sir?

A. Police Officer, City of Henderson.

Q. How long have you been a police officer?

A. Approximately two years.

Q. And directing your attention to February 18, 1968, were you on duty as a police officer for the City of Henderson, Nevada on that date?

A. I was, sir.

Q. On that date at about 10:10 A.M. were you on patrol?

A. Yes, sir.

Q. Were you near the Safeway Store's parking lot?

**[195]** A. I was.

Q. And did you observe any persons in that vicinity?

A. Yes, sir. I observed two unidentified to this officer Negro male adult subjects.

Q. Now, do you see one of those people here today?

A. I do, the defendant.

Q. After you saw these two subjects what did you observe them to do?

A. As the two subjects appeared to look at my police unit, they quickly turned and started walking in an opposite direction.

Q. Is that the opposite direction from which they had been moving in?

A. Yes, sir.

Q. All right. Now, you were in a marked unit?

A. I was.

Q. And would you describe that, please?

A. It is a 1967 Plymouth Fury II. Primarily black with white doors and two red beacons atop.

Q. Did it have any emblems attached to the door?

A. The shield of the Henderson Police Department on either side.

Q. And how were you dressed on this occasion?

A. In the regulation police uniform of our city.

Q. What is that like? Is it brown or black,

A. It is tan in color. With this particular uniform, I believe it was winter type with black tie.

**[196]** Q. Now, after you observed these two suspects look toward your vehicle and turn and proceed in an opposite direction, what did you observe them to do next?

A. The suspects appeared to continue to look back toward my vehicle from time to time and walk in a very rapid manner.

Q. What did you then do?

A. I then proceeded to make a U-turn and go back toward the area in which I had witnessed them.

Q. What did they do at that time?

A. They appeared to notice, after I had turned around and again walking in a rapid manner split apart from each other and began walking in opposite directions.

Q. Then, what did you do next?

A. I advised Sgt. Walter Zawrotny via radio communication that I had intended to stop the two subjects and that they had just split apart and that I intended to stop the subject who was heading to the rear of what we identified as the Rascoe Department Store.



Q. Then, what did you do next?

A. Upon coming and approaching to the rear of the subject I honked my horn. He failed to stop at first. I then quickly put the vehicle into the park position and jumped out and asked the subject to halt.

Q. And was he still moving at the time that you honked the horn?

A. He was, sir.

**[197]** Q. In what manner was he moving?

A. In an evasive manner. He didn't want to turn and confront me.

Mr. Foley: Just a moment. If the Court please, I ask that that be stricken as a conclusion of this witness.

The Court: The motion to strike is granted.

Q. (By Mr. Pike:) The term "evasion" is a conclusion of law. So instead we need to go through what he physically did.

The Court: What did he do?

The Witness: He didn't turn around. He continued to walk ahead in a rapid manner.

Q. (By Mr. Pike): Now, as soon as you stopped your vehicle and jumped out, what if anything did you see?

A. I asked the subject, I believe, in my words I said, "Wait a minute."

Q. All right, and did he then stop?

A. He then stopped and turned around.

Q. Did you go up to him?

A. I did.

Q. What happened then?

A. I asked the subject if he had any identification on his person. He stated that he did not and that it had been recently stolen from him.

Q. Did he give you his name?

A. He did, sir.

Q. What name did he give you?

[198] A. Lloyd Charles Powell.

Q. Then, what did you do next? Did you make any checks on him?

A. I did. I obtained his age which was 21 years. Date of birth the 6th month, I believe, year '47. Pardon me. January 6, 1947, and I ran his name along with his date of birth through a record check at the Henderson Police Department with a negative result.

Q. Did you ask him where he had been staying?

A. I did.

Q. What did he tell you about that?

A. He stated that he had been staying with friends in Las Vegas.

Q. Did you ask him where these people lived?

A. Yes, sir. He was unable to give me a name of a street nor the name of his friends.

The Court: What time was this, sir?

The Witness: I witnessed the subjects at approximately 10:10 A.M. in the morning, Sunday morning.

Q. (By Mr. Pike): What kind of an area was it that you first saw them there, residential, commercial?

A. Commercial area. It was a shopping center.

Q. Were the shops open at that time?



A. They were.

Q. Now, after you asked him for identification and he told you his name only, did you thereafter place under arrest?

[199] A. No, sir. I again questioned him and at the same time about the friends in Las Vegas and asked him where he was en route to which he stated back to Michigan.

Due to the fact that the subject had no real answer as far as where he had been staying nor the friends that he was with nor could give me a reason for being in the Henderson area, I consequently did place him under arrest.

Q. And what did you arrest him on?

A. Under our Vagrancy Ordinance in the City of Henderson, Section H.

Q. Thereafter, did there come a time when you examined his clothing and person?

A. I did, sir. After the arrest I did search the subject. He was standing at the front of the patrol car. I believe the subject was clothed in an orange suit with a black turtle-neck dickie and carrying a brown leather jacket draped across his arm.

Q. Would that be a black leather jacket?

A. I believe it was a brown leather jacket, sir. I am not sure.

Q. Now at this time Officer I show you People's Exhibit No. 7 for Identification and I ask you if you recognize that?

Mr. Foley: If the Court please I think this is now irrelevant. The point, while we are in here, the fruits of what he found is irrelevant to this proceeding. In this proceeding in here right now all we are concerned

[200] about is whether or not the arrest was legal and the search was legal.

The Court: Well, probably right.

Mr. Foley: I just want to protect the record. If I don't object to his testifying about the gun, then I don't want to waive my right to testify (sic) out there.

The Court: You mean your right to cross-examine?

Mr. Foley: I mean my right to object in front of the jury.

As far as this issue in here is concerned before you, I really have no objection as to whether or not he testifies about what he found but ——

The Court: Go ahead.

Mr. Foley: — I assert my right ——

The Court: It is understood that you are reserving the right to object in front of the jury.

Mr. Pike: This will all have to come out in front of the jury again. It seems to me we are at the point of deciding whether or not the arrest is lawful or unlawful and I can proceed with questioning but it will have to be done again.

Mr. Foley: Not out there, counsel, if he decides that the arrest is unlawful.

The Court: Do you have some other questions?

Mr. Pike: Only now to go into the identification of the gun, your Honor. It will have to come out in front [201] of the jury.

Mr. Foley: May I cross-examine him, then, about the ——

The Court: Yes.



*Cross-Examination*

By Mr. Foley:

Q. Officer, this was a Sunday morning, right?

A. Yes, sir.

Q. And about 10:00 o'clock in the morning when you first observed the two Negroes, is that right?

A. Yes, sir.

Q. And were they in the parking lot of this shopping center?

A. They were.

Q. Were there other cars in the parking lot? Were there cars in the parking lot?

A. There were cars in the parking lot.

Q. Were other people in the parking lot?

A. Yes, sir.

Q. And some of the stores were open for business, is that right?

A. Some of the stores were open being Sunday morning, yes, sir.

Q. And, all right, and then you decided it was best to check these two persons for two reasons, did you not: One, due to the fact that they were unknown to you and number two, due to their suspicious actions when they saw the police [202] unit?

A. That is correct.

Q. All right. Are you suspicious, sir, of all unknown persons that you see at 10:00 o'clock on a Sunday morning?

A. No, sir.

Q. How big a community is Henderson?

A. It is approximately 17,000 population, I believe.

Q. Are there Negroes that live in Henderson?

A. Yes, sir.

Q. I take it that you don't personally know all of the persons, then, who live in Henderson?

A. No, sir.

Q. And when you first saw these two persons you didn't know whether they lived in Henderson or didn't live in Henderson, is that right?

A. No, sir.

Q. Well, I had better rephrase that so we ——

Did you know whether or not these two persons lived in Henderson?

A. No, sir.

Q. And how far is Henderson from Las Vegas?

A. Approximately, a guess, eight miles.

Q. Pardon me. Did you say eight miles?

A. Yes, sir.

Q. And is it north, south, east or west of Las Vegas?

A. It is south.

[203] Q. And is it on any highway, sir?

A. Yes, sir.

Q. Which one?

A. US 93, Alternate Route 95 and 466, Boulder Highway.

Q. Could one of those routes take you to, say, Michigan?

A. Yes, sir.

Q. Now, you asked the defendant where he had come from, right?

A. That is correct.

Q. And he told you he came from Las Vegas, is that right?



A. That is correct.

Q. And you asked, eventually, where he was going to, is that right?

A. I did.

Q. And he told you he was going to go to Michigan, is that right?

A. That is correct.

Q. And you had no reason to doubt that he was going to Michigan, did you?

A. No, sir.

Q. Did you ask him whether or not he had any money on him?

A. I don't believe I did, no, sir.

Q. Now, there's some sort of an access road in this shopping center?

A. Yes, sir, there is.

Q. And where is that located in the shopping center?

A. It is known as the frontage road. It is located directly [204] parallel to the Boulder Highway in the area in front of the Safeway Shopping Center.

Q. Now, when you saw those two persons were they on the access road or were they in the shopping center?

A. They were within the parking lot of the shopping center.

Q. Now, in your report didn't you write "At this time I witnessed the first subject to be walking to the area of the Rascoe Department Store located within the parking lot while the second subject continued walking in a southerly direction down the access road adjacent to the Safeway Store."

A. That is correct.

Q. Now, when you say "the second person continued walking in a southerly direction down the access road" do you mean that he had been walking in a southerly direction on the access road when you first saw him?

A. No, sir.

Q. Now, after you stopped the defendant and was talking to him, you asked him his name, is that right?

A. That is correct.

Q. His name — he gave you the name of Lloyd Charles Powell, right?

A. Yes, sir.

Q. You asked him his date of birth, right?

A. That is correct.

Q. And he gave you the date of January 6th, 1947?

[205] A. Yes, sir.

Q. And did he appear to you at that time to be about a twenty-one year old person?

A. Yes, sir.

Q. And you had no reason to believe that he was lying about the date of birth?

A. Possibly.

Q. All right, from his appearance?

A. No, sir, just because of my suspicious nature.

Q. All right. You do have a suspicious nature don't you, Officer?

A. Yes, sir.

Q. And when he told you his name was Lloyd Charles Powell, you had no reason to believe that he was lying to you, did you, except for your suspicious nature?



A. Correct.

Q. And did you check with your headquarters to find out if there were any wants on a Lloyd Charles Powell, didn't you?

A. On the name, yes, sir.

Q. And they reported back to you before you made the arrest, isn't that right?

A. That is correct.

Q. And in reporting back to you they told you there were no wants that they knew of for this boy, for a Lloyd Charles Powell?

A. Yes, sir, for the name.

[206] Q. All right, and have you told us, sir, all the reasons you can think of upon which you based this arrest?

A. I believe I related all the facts to Mr. Pike.

Q. All right.

The Court: Now, not what you related to him but have you told the Court everything?

The Witness: Yes, sir.

Q. (By Mr. Foley): And when you just said you related all to Mr. Pike you meant in answer to Mr. Pike's questions in this courtroom?

A. Yes, sir, during my testimony.

Q. All right. What does the Vagrancy Statute in Nevada provide, the one on which you arrested him?

Mr. Pike: At this time, your Honor, the Officer has a certified copy of the Vagrancy Ordinance with him.

Mr. Foley: May I look at it?

Mr. Pike: I would suggest that rather than have him testify as to legal conclusions, we will offer this into evidence.

Mr. Foley: May I see it first, Counsel?

Mr. Pike: Certainly.

Q. (By Mr. Foley): At anytime did Mr. Powell refuse to answer any questions?

A. He refused to answer my questions directly.

Q. All right. Now, how many questions did he refuse to answer directly?

[207] A. Three.

Q. All right, what were the three questions and what were the answers that he gave?

A. When asked how long he had been staying in the Vegas area.

Q. What if anything did he say?

A. I believe he stated "For a while". I will have to refresh my memory. I am not sure whether he told me the exact time or not, but he did not give me the amount of days which he had been in the area which I wanted and requested.

Q. Do you have something by which you can refresh your memory?

A. Yes, sir, I have my handwritten copy of my arrest report.

Yes, sir, he did state "For the past few days" was the actual statement that he made to me.

Q. All right. What was the next question that you asked him and you got an indirect answer?

A. I asked him with whom he had been staying and residing.

Q. What was his answer?

A. He had no names for me.

Q. What was his answer?

A. He didn't answer. He shrugged his shoulders.



Q. Did he say "With some friends"?

A. With some friends, yes, sir. This was later after I had asked him as to the residence.

Q. What other questions did he——

A. I asked him where the residence was. He stated that he was—he didn't know the address. He was just staying with [208] some friends in Vegas. That was his actual statement.

Q. Now, did you, sir, arrest him for violation of Subsection H of the Vagrancy Statute?

A. Yes, sir.

Q. And that provides "Loiterers or wanderers upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

Is that the subsection that you arrested him on?

A. It is.

Mr. Foley: I have no further questions.

Mr. Pike: I have a few other questions, then.

*Redirect Examination*

By Mr. Pike:

Q. With regard to the direction, if he had been in Las Vegas, would he, in order to reach Michigan, go south to Henderson, Nevada?

A. No, sir.

Q. Which direction would he have gone?

A. Easterly.

Q. So, if he had been in Las Vegas, then, to be in Henderson en route to Michigan was it reasonable or unreasonable?

[209] A. It was unreasonable in my opinion.

Q. Now, after you stopped the defendant did you search his person?

A. After the arrest?

Q. Yes.

A. Yes.

Q. At this time I show you People's Exhibit No. 7 and ask you if you recognize it?

A. I do.

Q. Where was it when you first observed it?

A. Within the jacket pocket of the brown coat which Mr. Powell possessed.

Q. And did you take possession of that weapon?

A. I did.

Q. Did you place any identifying marks on it?

A. Yes, sir, I did.

Q. And where are they?

A. On the base of the wooden grips. Also upon the metal of the gun itself.

Q. And does the gun now appear to be in substantially the same condition as it was when you——

A. It certainly is.

Q. You didn't do anything to modify it?

A. No, sir.

Q. Do you happen to recall the condition of the chamber as to live or expended shells?

[210] A. Yes, sir. There were six expended .38 Smith and Wesson cartridges within the chamber within the cylinder.



Q. By "expended" you mean they had been discharged, then?

A. Yes, sir.

Mr. Pike: At this time, your Honor, I respectfully submit that we go back out before the jury and present this information and I think the officer——

Mr. Foley: Wait a moment, Counsel. I have a couple of questions.

*Recross-Examination*

By Mr. Foley:

Q. This search that you made of this defendant was a search after the arrest, right?

A. Following the vagrancy arrest.

Q. Right, and you made that search incidental to that arrest, right?

A. Yes, sir.

Mr. Foley: Thank you. I have no further questions.

Mr. Pike: This will be People's Exhibit No. 12, I believe?

The Clerk: Yes.

The Court: It may be marked.

Mr. Pike: May it be received in evidence?

Mr. Foley: Not numbered for the jury consideration. [211] This should be marked separately for your consideration.

Mr. Pike: It should be in evidence before the Court.

Mr. Foley: I agree with that.

The Court: It is received in evidence for the Court's information, then, as——

Mr. Pike: Not to go to the jury, then.

The Court: With the understanding that it is not to be exhibited to the jury. It will be People's Exhibit ——

The Clerk: Twelve.

The Court: It may be admitted.

Anything else?

Mr. Foley: No but I would like to be heard after counsel has made his motion.

Mr. Pike: I think that now the next thing to do is, you have made an objection.

The Court: Your objection.

Mr. Foley: Yes. All right. I have made an objection, your Honor, on the basis that this search was incidental to an illegal or an unlawful arrest. A police officer who makes an arrest—strike that—counsel, will you stipulate for this proceeding that the officer did not have a warrant of arrest or search warrant?

Mr. Pike: Yes, sir.

Mr. Foley: I will so stipulate. The officer may make an arrest of a defendant for a misdemeanor committed **[212]** in his presence, make that arrest without a warrant if he has probable cause for believing that the defendant is committing that particular crime.

Now, at 10:00 o'clock in the morning on a Sunday morning seeing two colored persons in a parking lot at Henderson, Nevada is not grounds in and of itself for an arrest. At 10:00 o'clock in the morning, watching the defendant and his friend act suspiciously when they, apparently, spot his car might be grounds for stopping them, checking their identification and frisking them; to stop and frisk route. So, then, the officer, however, because of his admittedly own suspicious nature was suspicious that the defendant gave the wrong answer when he was asked to identify himself and gave the wrong date of birth.



That section says that you are guilty of a crime if you loiter and wander about from place to place and you refuse to identify yourself and, then, it goes into public safety and so forth.

I submit, your honor, that this was an illegal arrest and the search incidental to it was illegal.

Mr. Pike: I would like to point out, your Honor, in that regard that the surrounding circumstances that call for an officer checking into this as is indicated in Subsection H are clearly met.

The two Negroes were unknown to the officer in the **[213]** community. They observed his vehicle, apparently, and therefore made a complete about-face in the direction of travel; looked back over their shoulders and, then, the officer made a U-turn. They split and went in different directions but thereafter that when he talked to the defendant he questioned him. He was not able to give him his reasons for being there. Instead he said he was going to Michigan and he was in the wrong line of travel if he was in Las Vegas to be heading for Michigan.

In addition to which he was unable to give him any identification as to these alleged friends and just gives him no names on that, no address at all. In all of these things, your Honor, I submit that he was a wanderer within the meaning of the ordinance. The ordinance is the law of Henderson, Nevada, and I think we should give it full credit.

Mr. Foley: He did not refuse to identify himself.

Mr. Pike: He did refuse to tell his business and what business he did tell was obviously false.

The Court: The objection is overruled.

**[214]** (The following proceedings were taken and had in open court, in the presence of the jury:)

The Court: The witness has been sworn in chambers. You may proceed.

Mr. Pike: Yes. Thank you, your Honor.

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*Edward R. Lattin,* called as a witness by and on behalf of the plaintiff, having been previously sworn, testified as follows:

*Direct Examination*

By Mr. Pike:

Q. Some of this will have to be a duplication because the jury hasn't heard it. What is your name, sir?

A. Edward R. Lattin.

Q. What is your business or occupation?

A. Police officer, City of Henderson, Nevada.

Q. How long have you been so employed?

A. Approximately two years.

Q. Directing your attention to February 18, 1968, were you on duty as a police officer for the City of Henderson, Nevada, on the morning of that date?

A. I was.

Q. And on that date were you in a patrol unit?

A. Yes, sir.



Q. What kind? Woud you describe that for the jury?

**[215]** A. It was a 1967 Plymouth Fury II, black in color, with white doors.

Q. Did it have any official police markings on it?

A. Yes, it did. It had badges on either side, decals.

Q. And those are the City of Henderson Police Department?

A. Yes, sir.

Q. Did it also have any particular police equipment, that is, mechanical devices?

A. Yes, sir. It had two Federal rotating beacons on the top of the vehicle.

Q. Were you in uniform at that time?

A. I was.

Q. What color is your official uniform?

A. Tan in color with black tie, gold stripes.

Q. Now, at about 10:10 in the morning of February 18 did you have occasion to be in the area of the Safeway Store's parking lot?

A. Yes, sir.

Q. And while in that area did you see two persons?

A. I did.

Q. And when you saw them, what, if anything, did you observe about them?

A. Both subjects appeared to be looking toward the direction of my police unit. When they observed my unit, they quickly turned.

Q. Did they then go in an opposite direction to that they had **[216]** been going in?

A. They did.

Q. Did they look back at all?

Mr. Foley: Objection. Leading and suggestive.

Q. What did they do next? Withdraw the question. What did they do next?

A. They appeared to continue from time to time to glance back at my vehicle.

Q. What race were these two individuals?

A. Negro.

Q. Do you see either one of them in court today?

A. I do.

Q. Would you point him out to the jury?

A. The defendant, Mr. Lloyd Charles Powell.

Q. Now, after you observed them to reverse their direction of travel and look back over their shoulder, what, if anything, did you observe next?

A. The subjects appeared to be walking in a rather rapid manner away from the area.

Q. Did you then change your direction?

A. I did, sir. I executed a U-turn.

Q. And did you return back in the direction of those two people?

A. I did.

Q. What did you observe then?

A. The subjects appeared to look back, and when they noticed **[217]** my vehicle heading toward their direction, they split apart from each other and began walking in the opposite direction.

Q. Did they move fast or slow at that time?

A. Again in a rapid manner.

Q. And did they look back?

A. They did.



Q. What did you do next?

A. I notified my patrol sergeant, Sgt. Zawrotny, that I intended to stop the subjects and asked for him to come and assist me.

Q. And did you then follow one of the subjects?

A. I did.

Q. What occurred?

A. I followed Mr. Powell, the defendant, towards the area to the rear of the Roscoe Department Store. He was walking rather rapidly, and as I followed him, I honked my horn when I was directly behind him and he failed to halt.

Q. Would you describe the area where you first observed these two men?

A. It was within the parking lot area of the Safeway Store.

Q. And where is that with relation to any major highways?

A. The Safeway Store shopping center, which incorporates several businesses, is parallel to the Boulder Highway that runs through the City of Henderson.

Q. Now, where is Henderson with reference to Las Vegas?

**[218]** A. Just south of Las Vegas.

Q. About how far?

A. I'd guess approximately eight miles.

Q. Now, when you observed Mr. Powell walk to the area of the rear of the Roscoe Department Store, what direction would that be with reference to the through highway?

A. Would you rephrase the question?

Q. Yes. In walking toward the Roscoe Department Store, would he have been walking toward or away from or in what relationship would he have been walking with relation to the through highway?

A. He would have been walking southeast away from the through highway.

Q. Which direction did the other person go in?

A. He at first turned and went in a southwest direction, and upon reaching the access road to the front of the parking lot, he walked south parallel to the highway.

Q. What highway is parallel to this shopping center?

A. U. S. 93, Alternate Routes 95 and 466, the Boulder Highway.

Q. Now, after you blew your horn behind Mr. Powell, what occurred next?

A. The subject continued walking at a rapid manner.

Q. What did you do then?

A. I then directed my police vehicle approximately a few feet further and put it into parking position and alighted from my vehicle.

[219] Q. What, if anything, did you say or do?

A. I asked the subject to stop.

Q. Did he stop?

A. He did.

Q. All right. Did you then go up and question him?

A. Yes, sir, I did.

Q. And did you run a record check on him?



A. Yes, sir, I ran a record check on the name that was given me.

Q. What name did he give you?

A. Lloyd Charles Powell.

Q. What birth date did he give you?

A. January 6, 1947.

Q. Did you ask him where he was going?

A. I did.

Q. What did he tell you?

A. Michigan.

Q. Did you ask him where he had been?

A. Yes, sir, I did.

Q. What did he tell you about that?

A. He stated that he had been in the Las Vegas area.

Q. Now, from California would one go from Las Vegas to Henderson in order to get to Michigan?

Mr. Foley: I'll object, your Honor, as calling for a conclusion of this witness as to what one person would do or would not do under certain circumstances.

[220] Mr. Pike: Let me rephrase the question.

Mr. Foley: All right.

Mr. Pike: The Court is already aware of the problem here.

Q. Is Henderson located in a direct route or in a route to Michigan from Los Angeles and through Las Vegas?

A. No, sir.

Q. Would you reach Henderson first or Las Vegas first when you go from California, Los Angeles or San Bernardino, to Detroit?

A. Las Vegas.

Q. Now, did you attempt to determine where Mr. Powell had been staying in Las Vegas?

A. I did.

Q. What did he tell you?

A. He stated he had been in the Las Vegas area for the past several days.

Q. Did you ask him the names of the people he had been staying with?

A. I did.

Q. What did he tell you?

A. He had no answer.

Q. Did you ask him where the location was that he had been staying?

A. I did. I asked him the residence in which he had been staying. He stated, "Just with friends in Las Vegas."

[221] Q. Did you ask him if he had any means of identification?

A. I did.

Q. What, if anything, did he present or tell you about that?

A. He stated he had no identification; that it had been recently stolen from him.

Q. Officer, I've got a question here in mind. If you leave San Bernardino and you go to Detroit, en route do you go through Henderson and Las Vegas?

A. No, sir.

Q. You don't?

A. No. You would be traveling on Interstate 15, which the last town before Las Vegas is Sloan, Nevada, and then in order to reach Henderson, you would have to take a cut-off.



Q. And go south?

A. Yes, sir.

Q. Would you be south of Las Vegas?

A. Yes, sir.

Q. Did there come a time then when you placed the defendant under arrest?

A. I did.

Q. And did you search him?

A. Incident to the arrest.

Q. At this time, Officer, I show you People's Exhibit No. 7 for identification. Do you recognize People's Exhibit 7?

A. I do.

Q. Where was that when you first observed it?

[222] A. Located within the jacket pocket that the defendant possessed.

Q. Now, did you place your initials or any identifying marks on People's Exhibit 7?

A. Yes, sir, on the base of the wooden grips and again in the metal of the gun.

Q. Is the weapon, People's Exhibit 7, now in substantially the same condition that is was in at the time that you took it from Mr. Powell?

A. Yes, sir.

Q. What was the condition of the cylinder as to whether or not there were any shells in it when you obtained the gun?

A. The cylinder contained six empty .38 caliber Smith & Wesson short cartridges.

Q. You mean they had been discharged or fired?

A. That's correct.

Q. Now, did you take the defendant to the police station?

A. I did.

Q. And when you arrived there, did he say anything about a different name?

A. He did, sir.

Q. What did he tell you then?

A. He stated that his name wasn't in essence Lloyd Charles Powell but it was actually Frank Jones.

Q. Did he tell you anything else about his identity at that time?

**[223]** A. He refused his age or his place of birth. I believe he refused everything except his name during the booking procedure.

Mr. Pike: I have no further questions. You may cross-examine.

*Cross-Examination*

By Mr. Foley:

Q. Officer, this was about 10:00 o'clock in the morning when you first saw the defendant, right?

A. Yes, sir.

Q. You saw him on a parking lot of a big shopping center, right?

A. At approximately 10:10 a.m.

Q. And the stores were open for business, weren't they?

A. A few stores.

Q. Safeway was open for business, wasn't it?

A. It was.



Q. And there were automobiles in the parking lot, weren't there?

A. There were.

Q. There were other people in the parking lot?

A. That's correct.

Q. And when you saw these two Negroes, you didn't recognize them, did you?

A. No, sir.

Q. And that was one of the reasons why you decided to check **[224]** them out, isn't that a fact, Officer?

A. Yes, sir. I wanted them to account for their presence.

Q. All right. So when you did arrest the defendant, you arrested him on a charge of vagrancy, isn't that right?

A. That's correct.

Q. And when you did ask him his name, he told you at the—right before the arrest, he told you his name was Lloyd Charles Powell, right?

A. That's the—That was the name he presented me.

Q. All right. And you asked him when he was born?

A. Correct, his date of birth.

Q. And he gave you January 6, 1947, right?

A. Yes, sir.

Mr. Foley: Thank you. I have no further questions.

Mr. Pike: I have no other questions. May the officer by excused, your Honor?

Mr. Foley: No objection.
Mr. Pike: He is here from Henderson, Nevada.
The Court: You are excused, sir.
Mr. Pike: Thank you very much.
(Witness excused.)

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[Opinion of the California Court of Appeal, Fourth Appellate District, Division Two, 4 Criminal No. 3388, filed October 7, 1969, affirming the judgment of conviction, which is printed as Appendix C of the Petition for Writ of Centiorari filed on February 22, 1975, in W.T. Stone, Warden v. Lloyd Charles Powell, USSC No. 74-1055, omitted in printing.]



United States District Court
Northern District of California

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Case No. C-70 1497 LHB

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Persons in State Custody

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LLOYD CHARLES POWELL

vs.

W. T. STONE, Warden

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[Filed August 24, 1971]

## FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

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1. Place of detention: California Training Facility, Soledad, California.
2. Name and location of court which imposed sentence: Superior Court, County of San Bernardino, California.
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
   (a) Crim. No. 21427
4. The date upon which sentence was imposed and the terms of the sentence:
   (a) June 10, 1968—Murder in the Second Degree.

5. Check whether a finding of guilty as made:
   (a) ..... after a plea of guilty.
   (b) ..... after a plea of not guilty.
   (c) ..... after a plea of nolo contendere.
6. If you were found guilty after a plea of not guilty, check whether that finding was made by:
   (a) xx a jury.
   (b) ..... a judge without a jury.
7. Did you appeal from the judgment of conviction or the imposition of the sentence? Yes.
8. If you answered "yes" to (7), list
   (a) the name of each court to which you appealed:
      i. Court of Appeal, Fourth District, Second Division.
   (b) the result in each such court to which you appealed:
      i. Affirmed.
   (c) the date of each such result:
      i. October 7, 1969.
   (d) if known, citations of any written opinion or orders entered pursuant to such results:
      i. 4/Crim. 388 (unpublished opinion)
9. If you answered "no" to (7), state your reasons for not so appealing:
   (a)
   (b)
   (c)



10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
   (a) See attached memorandum of points and authorities, which is incorporated by this reference.
11. State consisely and in the same order the facts which support each of the grounds set out in (10):
   (a) See attached memorandum of Points and Authorities, which is attached and incorporated by this reference.
12. Prior to this petition have you filed with respect to this conviction:
   (a) any petitions in State or Federal courts for habeas corpus or coram nobis? Yes.
   (b) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.
   (c) any other petitions, motions or applications in this or any other court? Yes.
13. If you answered "yes" to any part of (12) list with respect to each petition, motion or application:
   (a) the specific nature thereof:
      i. Writ of Habeas Corpus.
      ii. .....
      iii. Writ of Habeas Corpus.
      iv. .....

(b) The name and location of the court in which each was filed:

i. California Supreme Court.

ii. .....

iii. United States District Court, Northern District of Calif.

iv. .....

(c) the disposition thereof:

i. Denied.

ii. .....

iii. Denied.

iv. .....

(d) the date of such disposition:

i. July 1, 1970

ii. .....

iii. September 17, 1970

iv. .....

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. None.

ii. .....

iii. Civil No. 70-1497, Docket Entry #2.

iv. .....

14. Has any ground set forth in (10) been previously presented to this or any other court, state or



federal, in any petition, motion, or application which you have filed? Yes.

15. If you answered "yes" to (14), identify:

(a) which grounds have been previously presented:

i. All of them.

(b) the proceedings in which each ground was raised:

i. Appeal—Court of Appeal, Fourth District, Second Division.

ii. Writ of Habeas Corpus—California Supreme Court.

iii. Writ of Habeas Corpus—Federal District Court, Northern District, of California (Judge Levin).

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) n/a

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? yes

(b) your trial, if any? yes

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.

(e). preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes.

18. If you answered "yes" to one or more parts of (17) list:

(a) the name and address of each attorney who represented you:

i. Edward P. Foley, 505 N. Arrowhead Avenue, San Bernardino, California.

ii. Richard R. Beswick, Suite 402, 323 West Court St., San Bernardino, California.

iii. Robert W. Peterson, University of Santa Clara Law School, Santa Clara, California (Appeal from denial by Federal District Court)

(b) the proceedings at which each such attorney represented you:

i. Trial.

ii. Appeal from conviction.

iii. Appeal from Denial of Writ of Habeas Corpus by Federal District Court.

19. If you are seeking leave to proceed *in forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 2 of this form)? Yes.

.....

Signature of Petitioner



State of California
County of Monterey
ss.

Lloyd C. Powell, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

.....

Signature of Affiant

Subscribed and Sworn to before me this ..... day of ....., .....

(month) (year)

.....

Notary Public

My commision expires .....

(month, day, year)

## MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS*

### *Statement of the Case*

Petitioner, Lloyd Charles Powell, was charged by information filed by the District Attorney of the County of San Bernardino, State of California, with the crime of Murder, in violation of California Penal Code Section 187, the overt act alleged being that the appellant on or about the 18th day of February, 1968, in the County of San Bernardino, State of California, did unlawfully murder Mary P. Parsons, a human being.

On the 8th day of March, 1968, the District Attorney of the County of San Bernardino, State of California, filed the information in the Superior Court of the State of California for the County of San Bernardino, at which time the Petitioner pleaded not guilty and requested trial by jury. The jury found the Petitioner guilty as charged the information.

Petitioner exhausted available state remedies by appealing to the Court of Appeal for the Fourth Appellate District, State of California, and by subsequently filing for a Writ of Habeas Corpus in the Supreme Court for the State of California. Petitioner suffered adverse rulings in both proceedings and then filed for a Writ of Habeas Corpus in the

*Misspellings in original.



United States District Court for the Northern District of California. (Civil No. 70-1497 GSL). The Petition was denied and a certificate of probable cause was issued. Petitioner appealed and on July 15, 1971, the appeal was dismissed pursuant to stipulation and the case was remanded to the District Court with leave to file an amended Petition. Accordingly, the present Petition was filed.

### *Statement of the Issue*

Petitioner contends that his conviction was in part the result of the introduction of illegally obtained evidence, in that fruits of an arrest made in violation of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States were introduced in evidence against him.

### *Statement of the Facts*

The incident in question occurred on February 18, 1968, at the Bonanza Liquor Store, 1052 W. 5th Street, San Bernardino, California (RT 8). The time of the occurrence was shortly after 12 o'clock midnight.

On the late evening of February 17, 1968, Mr. John Chaney, Mr. Lester Mercer, Mr. Fred Buckley, and Petitioner Lloyd Powell were in a cocktail lounge when they decided to go to a liquor store and purchase some liquor (RT 132). Mr. Mercer purchased some cigarettes and beer, and attempted to give Mr. Buckley some change to buy a drink (RT 67, 133). At that time, Mrs. Parsons, the clerk behind the counter, leaned over and asked Petitioner if he was

going to pay for the wine (RT 68). By this time, Mr. Parsons came from the back room to confront the Petitioner. The Petitioner responded, "What wine? I have no wine.", whereupon Mr. Parsons grabbed his jacket stating, "You're going to pay for the wine that you have under your coat or what are you going to do?" (RT 68) Petitioner struck or pushed Mr. Parsons (RT 12).

Mr. Parsons asked his wife for the gun that was kept at the counter (RT 12, 69). There is conflicting testimony by the state's two witnesses, Mr. Parsons and Mr. Buckley as to whether the Petitioner left the store immediately after the scuffle. Mr. Parsons claims when he next looked up with the gun in his hand the Petitioner was no longer in the store. He did not see him leave (RT 12, 13). On the other hand, Mr. Buckley testified that he never saw the Petitioner leave the store (RT 70).

Mr. Parsons pointed the gun at the Petitioner and cocked it (RT 16, 70). Parsons claimed that he purposefully shot out of the line of fire, and then dropped the gun when the Petitioner kept advancing (RT 16, 17). Mr. Buckley testified that Petitioner grabbed his arm and the gun discharged (RT 70). According to Buckley, the gun was never dropped, but rather a struggle over the gun ensued (RT 71). In any event, there were discharges wounding Mr. and Mrs. Parsons. At one point Mr. Parsons got another gun and shot Mr. Buckley in the arm. (RT 22, 87). Buckley ran out of the store after being shot leaving only Mr. Parsons and his wife in the store.



On the following day, Officer Lattin of the Henderson, Nevada, Police Department, observed the Petitioner and Mr. Chaney as they looked in the direction of his police unit. The two men then turned and walked in the opposite direction. They walked in a rapid manner, and thereafter split apart. Lattin pulled up behind the Petitioner, honked his horn and thereafter jumped out and ordered him to stop. The Petitioner did not put forth any identification at the request of Lattin, explaining that it had been stolen from him earlier. The Petitioner, however, did give him his true name—Lloyd Charles Powell—and his birthdate. Lattin ran a namecheck through the Henderson Police Department with a negative result (RT 198). The Petitioner told the officer that he had been staying with friends in Las Vegas. All of the above events occurred in a commercial area at approximately 10:10 A.M. on Sunday morning, a time when there were people in the shopping center, and the stores were open for business (RT 158). Lattin arrested the Petitioner under Henderson, Nevada's Vagrancy Ordinance because he could not give the exact number of days that he spent in Las Vegas, and because Petitioner could not give the name and address of his friends in Las Vegas (RT 207). After the arrest, Petitioner was searched and the alleged murder weapon was found in his coat pocket. At the station he told the officer his name was not Lloyd Charles Powell (RT 222). Petitioner was held and subsequently transferred to the County of San Bernardino, California, where he was detained pending trial. The circumstances of his arrest, the gun, and

Petitioner's attempt to change his name were all introduced at the trial (RT 214-224).

*Argument*

A. *The Henderson, Nevada, Vagrancy Ordinance is unconstitutionally vague in that it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.*

The ordinance provides:

> Every person is a vagrant who:
> Loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by a police officer to do so if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

Petitioner was arrested for violation of this ordinance, and the search pursuant to that arrest uncovered the gun which was later introduced at the trial as the murder weapon.

It is elementary that the government cannot proscribe as criminal conduct that it cannot define with sufficient particularity to give a man of ordinary intelligence fair notice of what is forbidden. In the recent case of *Palmer v. City of Euclid,* 39 U.S.L.W. 4612 (May 24, 1971) the United States Supreme Court applied the above test to the phrase "without visible or lawful business" and unanimously held that, as applied to someone discharging a lady (whose name he did not know) from an automobile late at



night under somewhat suspicious circumstances, the language was constitutionally infirm. If this be so, then certainly the phrase "without apparent reason or business" (a broader and more vague injunction than the Euclid Ordinance) is unconstitutional when used to arrest a man walking in a shopping center during daylight business hours.

The ordinance is unconstitutionally vague in other respects. It gives no guidelines for the application of a definite and uniform standard for determining what "refuses to identify himself and account for his presence" means. Nowhere is there any effort made to tell the officer or the defendant what information must be obtained in order to avoid the charge of vagrancy. In the present case Petitioner gave his true name and accounted for his presence, yet he was arrested apparently because the officer did not find Petitioner's account satisfactory. In *Ricks v. District of Columbia,* 414 F.2d 1097 (D.C. Cir. 1968), fn. 52, the court said the effect of a similar District of Columbia law was to place the

> . . . sole determination in the discretion of the policeman on the beat. The standard of the 'satisfactory account' is not certain, for what may be satisfactory to one may be unsatisfactory to another and the meaning of the word satisfactory itself is not susceptible of any standard of exactness. What kind of satisfactory? Legal or moral satisfaction? What is the time limit to be embraced within the giving of a satisfactory account that will excuse the offender in the sole discretion of the police officer who demands it? A satisfactory account at that instant, or a satis-

> factory account of past activity? If of past activity, is that not guilt without proof? Does the mere fact that one cannot give a satisfactory account of himself to the pleasure of the inquiring officer make him guilty of an unspecified crime? Such unbridled discretion cannot be constitutionally vested in the policeman or the court.

It is submitted that such unbridled discretion to arrest free of guidelines leaves the relationship of the officer to the citizen one of unconcious anomie.

Even the final phrase of the ordinance is constitutionally suspect. The point might be made by asking the rhetorical question: How does a law abiding citizen shopping in Henderson Nevada avoid placing himself in a situation where the "surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification?" Certainly the answer "If a police car passes, don't look at it, keep talking to whomever you are with and, what ever you do, do not walk in the opposite direction or part company" does not suggest itself.

*B. By requiring one on request to identify himself and account for his presence the Henderson ordinance violates the Fifth and Fourteenth Amendment rights not to incriminate oneself.*

By making refusal "to identify himself and to account for his presence when asked by a police officer to do so" an element of the offense, the Henderson Ordinance makes the exercise of one's Constitutional



right not to incriminate oneself an element of the very crime for which the suspected vagrant is arrested. Needless to say, it cannot be made a crime to exercise one's constitutional right to remain silent.

In *California v. Byers,* 39 U.S.L.W. 4579 (May 17, 1971) the United States Supreme Court, in a plurality opinion with four dissenters, narrowly upheld the constitutionality of California Vehicle Code § 20002(a) (1), which requires the driver of a vehicle involved in an accident to stop and give his name and address to the owners of any damaged property. While there is a superficial similarity between the requirement of the California Vehicle Code and the Henderson Ordinance, the *Byers* case and prior Supreme Court cases actually support the proposition that the Henderson Ordinance is unconstitutional.

In analyzing the constitutional question, it should be kept in mind that "whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one." *Byers,* supra, at 4580. The Court gave three somewhat interrelated reasons why §20002(a) (1) escaped constitutional condemnation:

1. § 20002(a) (1) was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising from automoble accidents.
2. Like the income tax laws, §20002(a) (1) was not directed at a group inherently suspect of criminal activities, but rather was directed at the public at large.

3. It would be an extravagant extension of the Fifth Amendment to hold that Identification is "testimonial" since disclosure of ones name and address is essentially a neutral act, somewhat akin to blood tests or lineup identification.

One seeks in vain to uphold the Henderson Ordinance on any one of the above grounds. To argue that the Henderson Vagrancy Ordinance is essentially regulatory and designed to promote the satisfaction of the civil liabilities of vagrants would be disingenuous. Nor can it be said that the disclosures are compelled from persons not "inherently suspect of criminal activities". Indeed, since one is not to be stopped and questioned under the ordinance unless "surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification," the testimonial requirement is clearly directed at a "selective group inherently suspect of criminal activities." *Leary v. United States,* 390 U.S. 6 (1969); *Grosso v. United States,* 390 U.S. 62 (1968); *Haynes v. United States,* 390 U.S. 85 (1968); *Marchettii v. United States,* 390 U.S. 39, 57 (1968).

Finally, assuming *arguendo* that disclosing ones name and address is not "testimonial", the Henderson Ordinance requires that the citizen go much further and, presumably in a narrative, "account for his presence". Even the plurality justices in *Byers* recognized that any requirement beyond identification would contravine previous statements of the Court, *Byers,* 4582 at fn. 6. It would seem clear that



if an account of one's presence would reveal the commission of or intent to commit crime, as the officer must suspect before questioning under the Ordinance, then to compel such an account on pain of criminal sanction is the paradigm of compulsory self-incrimination.

*C. Even if the Henderson Ordinance is not constitutionally infirm, the arrest of Petitioner under the Ordinance violated his Fourth Amendment right to be free from unreasonable searches and seizures.*

Before an officer is warranted in arresting a suspect under this Ordinance, the officer must have probable cause to believe that:

1) the suspect is loitering or wandering from place to place without apparent reason or business;
2) the suspect must refuse to identify himself *and* refuse to account for his presence when so requested by the officer; and
3) the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

None of the above three requisites were established by Officer Lattin prior to the arrest of Petitioner.

Petitioner was not wandering or loitering with no apparent reason or business. He was in a shopping center during daytime business hours. Unless every other shopper in the center could be considered wan-

dering or loitering without apparent reason or business, there were clearly no grounds to arrest Petitioner. This is not a situation such as existed in *People v. Caylor,* 6 Cal. App. 3d 51, 85 Cal. Rptr. 497 (1970) (construing a similar California Disorderly Conduct Statute) where the suspect was in a residential area at 11:30 P.M., or as existed in *People v. Weger,* 251 Cal. App. 2d 584, 59 Cal. Rptr. 661 (1967) where the suspect was abroad at 2:30 in the morning.

Even when questioned, Petitioner did not refuse to identify himself. He gave the officer his true age and name. The officer ran a name check on him turning up nothing. The officer candidly admitted he had no reason other than his "suspicious nature" (RT 205) to believe the name and birth date were false. This admission completely negates probable cause for the existence of one of the elements of the offence.

Petitioner accounted for his presence by telling Officer Lattin that he stayed with some friends in Las Vegas for a few days and he was on his way to Michigan. The officer had not reason to doubt the fact that Petitioner was going to Michigan, and Petitioner's statements were in no way contradictory. Henderson is only eight miles from Las Vegas. Although Henderson is the lesser of the two, both cities are gambling and entertainment meccas relying to a large extent, if not primarily, on out of state, transient business. The nature and proximity of the cities belies any contention that someone bound for



Michigan might not find himself temporarily in Henderson and without a wallet to boot. He was arrested only because he could not give the exact number of days he had spent in Las Vegas and because he could not give the name and address of his friends there. Neither of these facts would seem unusual for one in transit from one state to another. In addition, it would seem unreasonable to arrest someone for failure to account for his *presence* on the grounds that he did not know how many days he had been *somewhere else.*

There was nothing to indicate that public safety demanded Petitioner's identification. There is no evidence that this shopping center was an area of high incidence of crime, nor, as in *People v. Caylor, supra,* had there been any reports of recent crimes or suspicious prowlers. The only indication that there was anything differentiating Petitioner from his fellow shoppers was that Officer Lattin testified Petitioner and his companion "appeared to look at my police unit" and then walked the other way, subsequently parting company. Certainly every day there must be many shoppers in the center who look at the unit and walk in the opposite direction. Are they all potentially subject to arrest for this innocuous conduct?

In invalidating a search, the Supreme Court of California identified the vice in permitting a police officer to impute a sinister motive to an otherwise innocent act.

> The difficulty is that from the viewpoint of the *observer,* an innocent gesture can often be mis-

taken for a guilty movement. He must not only perceive the gesture accurately, he must also interpret it in accordance with the actor's true intent. But if words are not infrequently ambiguous, gestures are even more so. Many are wholly nonspecific, and can be assigned a meaning only in their context. Yet the observer might view that context quite otherwise from the actor; not only is his vantage point different, he may even have approached the scene with a preconceived notion—consciously or subconsciously—of what gestures he expected to see and what he expected them to mean. The potential for misunderstanding in such a situation is obvious.

It is because of this danger that the law requires more than a mere "furtive gesture" to constitute probable cause to search or to arrest. The United States Supreme Court recently reaffirmed this rule in the case of *Sibron v. New York,* 392 U.S. 40, 66-67, 88 S. Ct. 1889, 1904, 20 L. Ed. 2d 917: 'deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea,* and *when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime,* they are proper factors to be considered in the decision to make an arrest.' (Italics added.) . . . 'As it is the information known to the police officers or the suspicious circumstances which turn an ordinary gesture into a furtive one, it is equally clear in this state that in the absence of information or other suspicious circumstances, a furtive gesture alone is not sufficient . . .' *People v. Superior Court of Yolo County,* 3 C.3d 807, 818, 91 Cal. Rptr. 729, 735, 478 P.2d 449, 455 (1970).



Since Officer Lattin had no evidence connecting Petitioner with any crime, and even a name check uncovered nothing, there was insufficient cause for this arrest. Officer Lattin candidly admitted he had preconceived notions—his "suspicious nature" (RT 205). Until we are prepared to condone the "roust" or return to the pre-Constitution evils of the general warrant, any arrest on grounds as tenuous as those in this case must be unconstitutional.

*D. It cannot be said beyond a reasonable doubt that introduction of the illegally obtained evidence that petitioner was armed when arrested had no impact on the jury's determination of guilt; therefore this error was prejudicial.*

The California District Court of Appeals affirmed this conviction on the grounds that any error was harmless within the meaning of *Chapman v. California,* 386 U.S. 18 (1967). This was clearly error.

Although the Petitioner was found guilty of second degree murder, the jury was given five possible verdicts: (1) first degree murder; (2) second degree murder; (3) voluntary manslaughter; (4) involuntary manslaughter; (5) not guilty. Since there was no question that there was a struggle and that the gun which killed the deceased was first in the possession of the deceased's husband, the jury was instructed extensively on doctrines of self-defense, justifiable homicide, and the law regarding the extent to which a landowner may use force to eject a trespasser. In fact, there was a substantial question at trial whether Petitioner had the alleged murder weapon in his pos-

session at the time the fatal shot was fired. Other than the Petitioner, the only living witnesses to the altercation were Mr. Parsons (the deceased's husband), Mr. Buckley, Mr. Mercer, and Mr. Chaney. Except for Mr. Buckley, all testified essentially that Mrs. Parsons handed Mr. Parsons the gun, he pointed it at Petitioner, there was a struggle over the gun during which Mrs. Parsons (who weighed 380 pounds (RT 187)) was throwing things at Petitioner. Mr. Buckley testified that Mrs. Parsons hit Petitioner with a postage-stamp dispenser (RT 104). Mr. Parsons even testified that the first shot was fired while he still had the gun.

The only person to testify that Petitioner actually shot Mrs. Parsons was Mr. Buckley, and his testimony is exceptionally weak. First he testified that he could not say who had the gun (RT 73). He was then confronted with a statement that he allegedly gave to the police in which he said "the next thing he [Buckley] knew what that Lloyd [Petitioner] had the gun and first of all shot the manager's wife, and then the manager". The trial recessed and when it reconvened, Buckley changed his story and testified that Petitioner had the gun in his hand (RT 125). Keeping in mind that Buckley had originally been charged with murder and could possibly have been charged with attempted larceney from the cash register, and keeping in mind that the statement allegedly given to the police was given while Mr. Buckley was intoxicated, bleeding (he had been shot by Mr. Parsons) and in pain, this evidence is weak indeed. If we add the fact that Mr. Parsons testified that the shooting occurred in the reverse order (Mr. Parsons was shot before Mrs. Parsons), it is quite likely that Mr. Buckley's testimony in this regard could have been rejected by the jury.



Given the evidence as it stood, a jury would have been reasonable in coming in with a verdict of voluntary or involuntary manslaughter, or not guilty. With all deference to the California District Court of Appeals, to say that the circumstances of Petitioner's arrest and the fact that he was armed when arrested could have no impact on the verdict would be naive. Since Petitioner was armed with the fatal weapon, it shows conclusively that at least at some time he got exclusive control of the gun. This would tend to corroborate Mr. Buckley's second version of what he saw, and would naturally tend to raise the degree of the crime. Also the fact that Petitioner was armed in a shopping center would create in the minds of the jurors the impression that the Petitioner is an evil, desperate man of violence. Indeed, the very fact that Petitioner was arrested in Henderson on the following day was used by the prosecution to show consciousness of guilt through flight. The fact that Petitioner gave his true name when confronted by the police, then after his arrest changed his name (RT 222) could be used for the same purpose.

Needless to say, flight plus possession of the fatal weapon is *substantial,* not trivial, evidence of guilt. It goes without saying that any trial lawyer would fight vigorously to keep out of evidence the fact that his client charged with murder by gunshot was armed with the fatal weapon when arrested. It is equally

clear that an experienced prosecutor would as vigorously try to get such a fact before the jury. Indeed, in spite of the potential invalidity of the arrest, the prosecutor in this case risked reversal in order to introduce the gun and Officer Lattin's testimony. Experienced trial counsel do not invite reversal in order to engage in idle acts. There is probably no better indication of the probative nature of this evidence than the fact that at trial the prosecutor expended such effort and took such risks to introduce it. Officer Lattin was brought all the way from Henderson to testify, and his testimony before the jury took ten pages (RT 214-224). Mr. Davidson, a ballistics expert, was called to testify that the fatal gun and the one taken from Petitioner were the same (RT 235). The prosecution's own conduct with respect to this evidence belies any contention that beyond a reasonable doubt this error did not contribute in any way to Petitioner's conviction. *Chapman v. California,* 386 U.S. 18 (1967).

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*Conclusion*

For the reasons that the Henderson Ordinance is unconstitutional, the arrest was without probable cause, the subsequent search was illegal, and the introduction into evidence of the gun and circumstances surrounding the arrest was prejudicial, Petitioner submits that his detention is illegal and an Order should issue requiring that Petitioner either be retried within 60 days or be released.

Respectfully submitted,
Robert W. Peterson
Attorney for Petitioner



United States District Court
for the Northern District of California

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[Filed Nov. 2, 1971]

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[Caption omitted in printing]

ORDER TO SHOW CAUSE

Based upon the petition filed herein and good cause appearing:

It Is Hereby Ordered that Respondent(s) file a return with this Court on or before the 12th day of November, 1971, to show cause, if any there be, why a writ of habeas corpus should not be issued herein;

It Is Further Hereby Ordered that the Clerk of this Court forthwith serve a copy of this Order upon Respondent(s) as well as upon Petitioner and a copy of the petition and of this Order upon official counsel for Respondent(s) and that Respondent(s) serve a copy of the return upon Petitioner prior to the filing thereof;

It Is Further Hereby Ordered that if Petitioner files a traverse to the return, Petitioner shall do so prior to the date next below specified; and

It Is Further Ordered that Respondent(s) or counsel for Respondent(s) appear in person before this Court on the 3rd day of December, 1971, to complete compliance with this Order to Show Cause.

Dated: November 1, 1971

Lloyd H. Burke
United States District Judge

United States District Court
Northern District of California

[Filed Jan. 14, 1972]

[Caption omitted in printing]

## RETURN TO ORDER TO SHOW CAUSE AND POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

Comes now W. T. Stone, Superintendent of the Correctional Training Facility, Soledad, California, and for a return to the order to show cause issued by this Court on November 1, 1971, and made returnable on or before January 14, 1972, states:

I.

That petitioner is lawfully in custody of respondent W. T. Stone pursuant to a valid judgment and commitment. On June 6, 1968, following a jury trial on his plea of not guilty in the Superior Court of San Bernardino County, he was found guilty of violation of California Penal Code section 187 (second degree murder). On June 10, 1968, he was sentenced to state prison for the term provided by law. On October 7, 1969, the judgment of conviction was affirmed by Division Two of the California Court of Appeal for the Fourth Appellate District (*People v. Powell,* 4 Crim. 3388, Unpublished Opinion). A petition to the California Supreme Court for a writ of habeas corpus was denied on July 1, 1970.



II.

On July 15, 1970, petitioner filed a petition in forma pauperis for a writ of habeas corpus in the United States District Court for the Northern District of California (No. C-70-1497 GSL). On September 17, 1970, the court entered an order denying this petition. An appeal from this order was dismissed by the Court of Appeals for the Ninth Circuit on July 15, 1971 (Ninth Circuit No. 26782). Petitioner was given leave by the court to file an amended habeas corpus petition with this Court. The present petition was filed on August 24, 1971.

III.

The exclusionary rule is inapplicable to the present case.

IV.

The Henderson, Nevada Vagrancy Ordinance is not unconstitutionally vague.

V.

The arresting officer had probable cause to believe that petitioner had violated the ordinance.

VI.

Even if the evidence was erroneously admitted, such error was harmless beyond a reasonable doubt.

Wherefore, it is respectfully submitted that the order to show cause heretofore issued be discharged, that the petition for writ of habeas corpus be denied and that the proceedings be dismissed.

Dated:

Evelle J. Younger,
Attorney General of the State of California

## MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

### *Statement of Facts*

On the evening of February 17-18, 1968, Gerald Parsons and his wife Mary were working at the Bonanza Liquor Store in San Bernardino. At approximately midnight, Mr. Parsons was seated in the rear office of the store while his wife was seated near the counter in the sales area of the store (RT 8-9)[1] Mr. Parsons heard the bell under the entrance mat ring, Through a one-way glass, he saw four male Negroes enter his store. Petitioner, one of these men, removed a bottle of wine from a shelf, put it inside his jacket, and closed the jacket. Parsons left the back room and approached him. He said, "What about the wine?" Petitioner replied, "What wine?" Mrs. Parsons replied, "That wine under your jacket." Petitioner responded that he had no wine. Parsons then opened petitioner's jacket, exposing a half-gallon bottle of wine. Petitioner then struck Parsons in the mouth with his fist (RT 10-12, 29, 32).

The other men then started to walk out of the store. Parsons asked his wife to hand him a .38 caliber revolver which they kept near the cash register. She handed it to him. Parsons then noticed that petitioner had left the store (RT 12-13). However, petitioner reentered the store a short time later. Parsons pointed the gun at him as he continued advancing toward him.

[1]"RT" refers to the Reporter's Transcript of petitioner's trial.



He then cocked the gun, raised it and fired a shot into the ceiling. Parsons then turned and placed the gun near an ice cream freezer. Petitioner passed him and seized the gun. Parsons then heard an explosion, felt a bullet strike him in the wrist, and became aware that he was bleeding (RT 16-17).

Parsons then ran for another gun which he kept in the office. At that time, he did not know where his wife was. He heard a shot and heard her scream. At the trial, Parsons was unable to remember exactly where he was when he heard the shot and heard his wife scream. He also heard the cash register bell ring. He returned from the office holding the second gun and observed Fred Buckley, one of the four men, leaning over the cash register. He fired a shot at Buckley, who immediately ran out the door (RT 18-19). He then observed that his wife had been shot. Parsons last saw the first gun he handled in petitioner's hand after he (Mr. Parsons) had placed it behind the ice cream freezer. He saw no one else handle the gun (RT 24).

Fred Buckley testified that he observed petitioner strike Parsons and saw Parsons obtain a gun from his wife. Parsons pointed the gun at petitioner, who grabbed Parsons' arm. The gun then discharged. Petitioner knocked the gun from Parsons' hand (RT 68-72). Buckley then saw petitioner holding the gun and heard a shot fired. He observed Mrs. Parsons fall to the floor. He heard the gun discharge again and saw that Mr. Parsons had been shot in the arm (RT 85-86). Buckley was then shot in the arm while he was standing near the cash register (RT 87).

San Bernardino Police Officer Donald Covey took a statement from Buckley at the San Bernardino City Hall. Buckley stated that petitioner had a bottle of wine hidden under his coat, that the manager spotted it, and that petitioner then gained possession of the gun and "shot the manager's wife and, then, the manager" (RT 161-162).

Lester Mercer, another of petitioner's companions, testified that when Mr. Parsons "went to wave the gun" he (Mercer) got upset and "flew out of there" (RT 141). Mercer observed that petitioner had something under his jacket (RT 134, 143). Although he heard a shot fired, Mercer did not see anyone get shot (RT 151). At the time he left, Mrs. Parsons was still behind the counter (RT 156).

John Chaney, another of petitioner's companions, testified that as Parsons grabbed petitioner's coat "the wine fell to the floor and bust" (RT 164-166). Chaney stated that the bottle was a fifth and that petitioner then shoved Mr. Parsons, that Mrs. Parsons then handed a gun to him. Chaney tried to pay for the wine "when the scuffle started". The gun discharged during the scuffle and Chaney ran from the store. Petitioner had grabbed the gun and was holding it when Chaney last saw it (RT 166-169).

San Bernardino Police Officer Bradford Hilder arrived at the Bonanza Liquor Store at 12:15 a.m., February 18, 1968, and observed no broken wine bottles. He did, however, observe a full wine bottle outside the store (RT 225-228). The bottle was a half



gallon of Gallo Wine with the seal intact (RT 260-261, 266). Fingerprints found on the bottle were of no value due to smudging (RT 265-266).

On the morning of February 18, 1968, during the post-mortem examination of the body of Mary Parsons, a lead slug was removed from the lung of the body. There was a high degree of similarity of individual striation markings observed during tests between the slug and bullets fired from the gun later found on petitioner's person. This similarity led John Davidson, a criminalist for the San Bernardino County Sheriff's Office who was called as an expert witness for the prosecution, to conclude that the bullets were fired from the same weapon (RT 235-240).

At approximately 10:10 a.m. on February 18, 1968, Officer Edward Lattin of the Henderson, Nevada Police Department was on routine patrol in a marked police unit near the parking lot of a shopping center in the City of Henderson. He observed two men, one of whom was petitioner, look at his police unit and then quickly turn and walk in the opposite direction (RT 194-195). The men looked back toward the police vehicle several times and continued walking rapidly. The officer made a U-turn and approached them. They then split apart and began walking in opposite directions. The officer approached petitioner from the rear and honked his horn. Petitioner continued to walk toward the rear of a department store. The officer stopped his vehicle, jumped out, and asked petitioner to halt. Petitioner then halted and turned around (RT 196-197).

The officer asked petitioner whether he had any identification. Petitioner replied that he did not since his identification papers had been stolen. In response to further questions, petitioner gave his name as Lloyd Charles Powell and his date of birth as January 6, 1947. The officer checked this name through the Henderson Police Department with negative results. Petitioner stated that he had been staying with friends in Las Vegas but was unable to give the name of these friends or the street on which they lived (RT 197-198). He said that he had been in Las Vegas "for the past few days" (RT 207). He also stated that he was en route to Michigan at that time (RT 199). The officer testified that Henderson was 8 miles south of Las Vegas and that a person going to Michigan from Las Vegas would proceed east and would not pass through Henderson (RT 202, 208-209).

The officer then arrested petitioner for violation of the Henderson vagrancy ordinance (RT 199). After the arrest, the officer searched petitioner's person and found a pistol with 6 expended cartridges in the cylinder. The pistol was found in the pocket of petitioner's coat (RT 209-210).

*Argument*

## I.

*The Exclusionary Rule Is Inapplicable to the Present Case.*

We note initially that no valid policy would be served at this time by holding the ordinance in question to be unconstitutional. Petitioner was arrested



for violation of the ordinance and a search was conducted pursuant to that arrest. It does not appear that he was prosecuted for violation of the ordinance. He now contends that the fruits of a search incident to that arrest should have been suppressed. The purpose of the exclusionary rule is to discourage illegal police conduct. *Mapp v. Ohio,* 367 U.S. 643, 656 (1961). That purpose will not be advanced by ex post facto condemnation of an arrest, apparently valid when made. *Pierson v. Ray,* 386 U.S. 547 (1967), was an action brought under the Civil Rights Act of 1871 (42 U.S.C. § 1983). Some of the defendants, police officers, had arrested the plaintiffs under a Mississippi statute later declared unconstitutional by the Supreme Court. The court held that they could not be liable in damages for acting under a statute that they reasonably believed was valid, but which would later be held unconstitutional, since they were not required to predict the future course of constitutional law. Although *Pierson* was, of course, an action against the arresting officer, we submit that its holding is applicable to the present case. See *People v. Carnesi,* 16 Cal.App.3d 863 (1971).

## II.

*The Henderson, Nevada Vagrancy Ordinance Is Not Unconstitutionally Vague.*

Petitioner first contends that the ordinance in question is unconstitutionally vague on its face. We note initially that the Supreme Court of the United States has consistently held that lack of precision itself is

not offensive to the requirements of due process. The court does not require impossible standards. All that is required is that the language of the statute conveys sufficiently definite warning as to the conduct proscribed when measured by common understanding and practices. *Roth v. United States,* 354 U.S. 476, 491 (1957); *United States v. Petrillo,* 332 U.S. 1, 7-8 (1947). A statute must be sufficiently explicit to inform those subject to it what conduct on their part will render them liable to its penalties. *Connally v. General Construction Company,* 269 U.S. 385 (1926). The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct. *United States v. Ragen,* 314 U.S. 513 (1942).

A statute must not, however, forbid or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is not sufficient reason to hold the language of the statute too ambiguous to define a criminal offense. *United States v. Petrillo, supra.* If the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. And, if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute,



this Court is under a duty to give the statute that construction. *United States v. Harriss,* 347 U.S. 612, 618 (1954). The Supreme Court of the United States has expressed its intention to go far to uphold statutes to deal with offenses difficult to define when they are not intertwined with limitations on free expression. Only a definite conviction that the Fourteenth Amendment has been violated justifies reversal of a decision by a court primarily charged with responsibility to protect persons from conviction under a vague state statute. *Winters v. New York,* 333 U.S. 507 (1948); see also *Alabama State Federation of Labor, Local Union v. McAdory,* 325 U.S. 450 (1945); *Porter v. Investors Syndicate,* 286 U.S. 461 (1932). In determining the sufficiency of the notice afforded by a statute, the statute must of necessity be examined in the light of the conduct with which the defendant is charged. *United States v. National Dairy Products Corp.,* 372 U.S. 29 (1963).

It is therefore significant to note that in a recent case presented to the Supreme Court concerning a vagrancy statute, the court failed to strike down the statute as void on its face, but held only that the conduct of the petitioner did not fall within the compass of the statute. *Palmer v. City of Euclid,* 402 U.S. 544 (1971); *cf. Coates v. City of Cincinnati,* 402 U.S. 611 (1971) (statute making it a criminal offense for a person to "conduct themselves in a manner annoying to persons passing by" held unconstitutional on its face since no standard of conduct was specified). In *Palmer, supra,* the statute in question provided that:

"any person who wanders about the streets . . . or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself" is subject to criminal penalties. The court reversed Palmer's conviction because, as applied to Palmer, the ordinance failed to give "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." In that case, police officers had observed Palmer's car in a parking lot. A woman left the car and entered an adjoining apartment house by the front door. Palmer then pulled onto the street, parked with his lights on and used a two-way radio. When approached by the officers, he told them that he had just let off a friend. He was then arrested. At the police station, he gave three different addresses for himself and said that he did not know his friend's name or where she was going when she left the car. The court held that Palmer could reasonably be charged with knowing that he was on the streets at a late or unusual hour and that his explanation of his conduct was unsatisfactory. However, the ordinance gave him insufficient notice that his actions were sufficient to show him to be "without visible or lawful business".

We submit that the ordinance in question in the present case is not unconstitutionally vague and uncertain. In *People v. Weger,* 251 Cal.App.2d 584 (1967), *cert. denied,* 389 U.S. 1047, the California Court of Appeal undertook a thorough examination of a California statute similar to the Henderson ordi-



nance and concluded that it was constitutional.[2] The court thoroughly considered the question of whether the terms "without apparent reason or business" and "refuses to identify himself and to account for his presence" were unconstitutionally vague and found that these terms conveyed sufficiently definite warning as to the type of conduct proscribed when measured by common understanding and practices. For the reasons set forth in that opinion (*Id.* at 588-599), we submit that the terms complained of are not unconstitutionally vague.

It further appears that *Ricks v. District of Columbia,* 414 F.2d 1097 (D.C. Cir. 1968), cited by petitioner, is inapplicable to the present case. There the statute in question, which provided that a suspected person must give a "satisfactory account" was held to be unconstitutionally vague since it furnished no guidance as to what constituted a "satisfactory account". In the ordinance in question in the present case, such an "account" is necessary only when "the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." Furthermore, the question of whether or not a particular account is "satisfactory" similarly appears to be a question for the courts and not for the discretion of the arresting officer. In *Palmer, supra,* the Supreme Court did not question the validity of a similar provision in the ordinance there in

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[2]Other California cases affirming the constitutionality of this statute are *People v. Caylor,* 6 Cal.App.3d 51 (1970); and *People v. Bruno,* 211 Cal.App.2d Supp. 855 (1962); see also *In re Cregler,* 56 Cal.2d 308 (1961).

question. The court held only that, as applied to Palmer's "account" of his presence, the ordinance was not unconstitutionally vague.

Petitioner further contends that the ordinance's requirement that the suspected person must "identify himself" and "account for his presence" is violative of the suspect's constitutional right to remain silent. The court in *Weger, supra,* found that the statute could not be construed as requiring the person interrogated to be a witness against himself. His silence would be mere nonassertive conduct. *Id.* at 599-602. The normal questions asked in such a situation would not be designed to elicit incriminating statements, but would give the suspect an opportunity to explain his presence and actions.

Similarly, in *Terry v. Ohio,* 392 U.S. 1 (1968), the court upheld the right of the police in appropriate circumstances to approach in an appropriate manner a person for purposes of investigating possibly criminal behavior, even though the police did not have probable cause to make an arrest. To be a meaningful aid to law enforcement, this right of investigation must, we submit, necessarily include the limited right to question the suspect regarding his identity and to ask him to account for his presence.



## III.

### *The Arresting Officer Had Probable Cause to Believe That Petitioner Had Violated the Ordinance.*

The facts relating to the circumstances of petitioner's arrest are detailed in our statement of facts, *supra.* We submit that these facts were sufficient to give Officer Lattin probable cause to arrest him. As noted in *People v. Weger, supra,* the word "loiter" has a certain and generally accepted meaning. The word has been defined to mean "to be slow in moving; delay, linger; saunter; lag behind" or "to linger idly by the way, to idle". *People v. Weger, supra,* at 591, citations omitted.

Here, the actions of petitioner and his companion in aimlessly wandering and changing their direction of travel several times at the approach of a police officer and in attempting to avoid the officer clearly met this definition. The surrounding circumstances were such as would indicate to a reasonable person that the public safety demanded that petitioner identify himself. Similarly, as in *Palmer,* petitioner's statements to the effect that he had been staying with friends in Las Vegas, although he could not name the friends or the street on which they lived, and his statement that he was en route to Michigan, when a person going from Las Vegas to Michigan would not pass through Henderson, could not constitute a satisfactory accounting for his presence.

## IV.

### *Even If the Evidence Was Erroneously Admitted, Such Error Was Harmless Beyond a Reasonable Doubt.*

In *Chapman v. California,* 386 U.S. 18 (1967), the Supreme Court held that federal constitutional error may be held harmless if a court is able to declare a belief that it was harmless beyond a reasonable doubt. Here, the California Court of Appeal, applying this test, held that any error with reference to admission of the gun into evidence or the receipt of testimony concerning seizure of the gun was harmless beyond a reasonable doubt.[3] We realize that the California court's conclusion of law in this respect is not binding on this Court. *Fay v. Noia,* 372 U.S. 391, 422 (1963). Nonetheless, we submit that the decision of the California Court of Appeal was correct and that this Court should reach a similar conclusion. Here, the testimony of three eyewitnesses to the incident established that petitioner obtained the murder weapon from Mr. Parsons after a struggle. Buckley saw him shoot Mr. and Mrs. Parsons. Mr. Parsons saw petitioner holding the gun, then heard an explosion and felt that he had been shot. A short time later, he heard a shot and heard his wife scream. He then observed that his wife had been shot. Witness Chaney also saw petitioner in possession of the gun, although Chaney left before Mr. and Mrs. Parsons were shot. The testimony of Lester Mercer also placed petitioner

[3]A copy of the opinion of the Court of Appeal is attached as Exhibit A.



at the scene of the crime. Mercer left the store before petitioner gained possession of the gun.

As the California Court of Appeal noted, the testimony of Officer Lattin regarding petitioner's possession of the gun in Nevada was not required to establish any essential element of the crime charged. His possession of the murder weapon at the scene of the crime, following an altercation with Mr. and Mrs. Parsons, was conclusively proven. Accordingly, we submit that, even if the introduction of the gun or the officer's testimony concerning the seizure of it was error, such error was harmless beyond a reasonable doubt.

### *Conclusion*

For the foregoing reasons, it is respectfully submitted that the petition for writ of habeas corpus be denied, that the order to show cause heretofore issued be discharged and that the proceedings be dismissed.

Evelle J. Younger, Attorney General
of the State of California.

[Exhibit A, a copy of the opinion of the California Court of Appeal is Appendix C to the Petition for Writ of Certiorari in W. T. Stone, Warden v. Lloyd Charles Powell, USSC No. 74-1055, and omitted in printing.]

United States District Court
Northern District of California

[Caption omitted in printing]

[Filed January 26, 1972]

## TRAVERSE AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF TRAVERSE

Comes now petitioner Lloyd Charles Powell and through his attorney Robert W. Peterson, by way of traverse to respondent's Return to Order to Show Cause, states as follows:

Petitioner is unconstitutionally deprived of his liberty for reasons set forth in his Petition for Writ of Habeas Corpus, Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus, and Memorandum of Points and Authorities in Support of Traverse. The latter is attached hereto and incorporated by this reference.

Robert W. Peterson,
Attorney for Petitioner



United States District Court
Northern District of California

[Caption omitted in printing]

## MEMORANDUM OF POINTS AND AUTHORITIES

### I

### *The Exclusionary Rule Is Applicable To The Present Case.*

The Attorney General, relying on *Pierson v. Ray*, 386 U.S. 547 (1967), argues that fruits of an illegal arrest may be introduced into evidence so long as the arrest is authorized by statute, even though the statute is unconstitutional. *Pierson* is not in point because it involved a *damage* action against police officers who made arrests under a statute later declared unconstitutional. The Supreme Court quite properly held that a police officer should not, through an award of damages, be made an insurer of the constitutionality of legislation. It does not follow from *Pierson* that fruits of arrest under unconstitutional statutes may be used with impunity. Indeed, the exclusionary rule was never mentioned by the court.

The purpose of the exclusionary rule is to discourage unconstitutional conduct of state agents by preventing use of the fruits of unconstitutional action. This rationale applies to city councils contemplating adoption of unconstitutional ordinances as well as policemen on the beat contemplating arrests. If the Attorney General's position were adopted, a city

council concerned about drugs could adopt an ordinance permitting search and arrest "in the discretion of the police officer" and, as long as defendants were prosecuted for drug or other offenses, not only could such unconstitutionally obtained evidence be used, but a defendant would have no standing to challenge the constitutionality of the ordinance under which he was arrested. The exclusionary rule is not so feeble as to permit such facile circumvention.

## II

### *The Henderson, Nevada, Ordinance Is Unconstitutional On Its Face And As Applied To Defendant.*

The Attorney General distinguishes *Ricks v. District of Columbia,* 414 F.2d 1097, (D.C. Cir. 1968) (phrase "satisfactory account" held unconstitutional as offering no guidance as to its meaning) on the grounds that under Henderson's Ordinance an "account" is required only when "the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." Clearly, the requirement that an observer must perceive a danger to public safety does nothing to tell the interrogated citizen what constitutes a satisfactory "account".

It is true, as the Attorney General points out, that *Palmer v. City of Euclid,* 402 U.S. 544 (1971) did not hold the phrase "visible or lawful business" unconstitutional on its face. There was no need to do so. The entire court agreed that the phrase was unconstitutional as applied to a fact situation more suggestive



of suspicious activities than those presented in the instant case. It should be noted that two of the Justices volunteered that they would have held the ordinance unconstitutional on its face if the narrower grounds had not been available to the court. In a companion case, the court did hold the phrase "conduct themselves in a manner annoying to persons passing by" unconstitutionally vague on its face. *Coates v. City of Cincinnati,* 402 U.S. 611 (1971). It is submitted that annoyance to others is more definite than the vague standards of the Henderson Ordinance.

While the requirement that "public safety" demand identification and an account for one's presence is an insufficient distinction of the *Ricks* case, *supra,* it clearly places defendant in that suspect group the Supreme Court has held need not identify itself, much less give a narrative account of its activity. That a California Court of Appeals upheld a similar California State Statute on the grounds that failure to "identify" or to "account" would be "mere nonassertive conduct" is beside the point. *People v. Weger,* 251 Cal.App.2d 584 (1967), simply stated, the right not to incriminate oneself is constitutionally protected "nonassertive conduct." In defence of the *Weger* court it should be noted that the *Weger* case was decided prior to the landmark decisions of *Leary v. United States,* 395 U.S. 6 (1969), *Grosso v. United States,* 390 U.S. 85 (1968), *Marchettii v. United States,* 390 U.S. 39 (1968).

It is argued that since *Terry v. Ohio,* 392 U.S. 1 (1968), permits a stop-and-frisk on "reasonable suspicion," the Henderson Ordinance requirement that

Petitioner identify himself and account for his presence is constitutional. It does not follow that because an officer may have a right to make a limited inquiry of a suspect, the officer has a right to an answer. Nothing in *Terry* suggests that it would be constitutional to make a crime out of one's refusal to answer an officer's incriminating questions. Of course, *Miranda v. Arizona,* 384 U.S. 86 (1966), clearly recognized the right to remain silent by requiring the police, under appropriate circumstances, to expressly advise an arrestee of the right. The California Supreme Court is in accord that one's refusal to answer an officer's inquiry may not even be used as a basis for arrest, much less conviction.

> Upon such inquiry the person questioned may elect to give an explanation of his 'furtive' movement or he may freely consent to a search. [cases omitted] He may on the other hand, elect to stand on his constitutional right not to cooperate with the officers in securing evidence against him.
>
> *Gallik v. Superior Court,* 97 Cal.Rptr. 693, 697 (1971).

Not only is the statute unconstitutional because violative of the Fifth and Fourteenth Amendments, but it follows that any statements of Petitioner made under compulsion of criminal sanction must be disregarded in determining the reasonableness of Petitioner's arrest.

Respectfully submitted,
Robert W. Peterson,
Attorney for Petitioner.



[Exhibit 1, the instructions to the jury in Respondent's state trial, omitted in printing.]

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[Order and Opinion of United States District Court for Northern District of California in Lloyd Charles Powell v. W. T. Stone, Warden, No. C-70-1497 LHB, filed February 8, 1972, which is printed as Appendix B to the Petition for Writ of Certiorari filed on February 22, 1975, in W. T. Stone, Warden v. Lloyd Charles Powell, USSC No. 74-1055, omitted in printing.]

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United States District Court
Northern District of California
[Filed Feb. 22, 1972]

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[Caption omitted in printing]

ORDER GRANTING CERTIFICATE OF PROBABLE CAUSE AND LEAVE TO APPEAL *IN FORMA PAUPERIS*

It is hereby ordered that a Certificate of Probable Cause Issue in the above styled action.

It is further ordered that petitioner be permitted to appeal *in forma pauperis* from this Court's Order denying his petition for writ of habeas corpus, entered by this Court on January 28, 1972. 28 U.S.C. §§ 1915, 2253; Fed.R. App. P.22(b).

/s/ Lloyd H. Burke
Lloyd H. Burke
United States District Judge

[Opinion of the United States Court of Appeals for the Ninth Circuit in Lloyd Charles Powell v. W. T. Stone, Warden, No. 72-1543, filed December 4, 1974, which is printed as Appendix A to the Petition for Writ of Certiorari filed on February 22, 1975, in W. T. Stone, Warden v. Lloyd Charles Powell, USSC No. 74-1055, and which is now reported at 507 F.2d 93, omitted in printing.]

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United States Court of Appeals
for the Ninth Circuit

[Filed Feb. 20, 1975]

[Caption omitted in printing]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Thomas A. Brady, Deputy Attorney General counsel for the Appellee, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41 (a) of the Federal Rules of Appellate procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellee herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before February 25, 1975.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the



final disposition of the case by the Supreme Court of the United States.

/s/ James R. Browning
James R. Browning
United States Circuit Judge

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Supreme Court of the United States

ORDER

Filed June 30, 1975

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Stone v. Powell

U.S.S.C. No. 74-1055

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The motion of the respondent for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. In addition to those questions presented by the petition, counsel are requested to brief and argue the following question:

Whether, in light of the fact that the District Court found that the Henderson, Nevada police officer had probable cause to arrest respondent for violation of an ordinance which at the time of the arrest had not been authoritatively determined to be unconstitutional, respondent's claim that the gun discovered as the result of a search incident to that arrest violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution is one cognizable under 28 U.S.C. § 2254.

Mr. Justice Douglas took no part in the consideration or decision of this motion and petition.

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UNITED STATES

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OCTOBER TERM, 1974

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NO. 74-1055

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W. T. STONE, WARDEN,

PETITIONER,

vs.

LLOYD CHARLES POWELL,

RESPONDENT.

---

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT
OF THE
UNITED STATES

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OCTOBER TERM, 1974

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NO. 74-1055

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W. T. STONE, WARDEN,
PETITIONER,
VS.
LLOYD CHARLES POWELL,
RESPONDENT.

---

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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## OPINION BELOW

The opinion of the Court of Appeals is now reported. Powell v. Stone, 507 F.2d 93 (9th Cir. 1974).

## QUESTIONS PRESENTED

1. Whether federal habeas corpus relief is available to review Fourth and Fifth Amendment claims of a state prisoner who has exhausted his available state remedies.

2. Whether an ordinance which makes it a crime to be a person who

> loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by a police officer to do so if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification

is unconstitutional because (a) it is vague on its face, (b) it was vague as applied to respondent, (c) it authorizes arrest and conviction on less than probably cause, and (d) it criminalizes the exercise of the privilege against self-incrimination.

3. Whether, under the above ordinance, a police officer had probable cause to arrest respondent who was walking with a companion in a shopping center parking lot during daylight business hours, cooperated with the officer when questioned, and correctly identified himself and gave an account of his presence.

4. Whether evidence seized in a search pursuant to an arrest under an unconstitutional vagrancy ordinance may be introduced into evidence.

5. Whether, if the murder weapon was erroneously admitted into at respondent's trial, it may be said beyond a reasonable doubt that the evidence of respondent's possession of the murder weapon, and evidence of the trigger pull of the weapon, did not contribute to respondent's conviction.

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## STATEMENTS OF FACTS

The incident in question occurred on February 18, 1968, at the Bonanza Liquor Store, 1052 W. 5th Street, San Bernardino, California (Reporter's Transcript 8, hereinafter R.T.). The time of the occurrence was shortly after 12 o'clock midnight.

On the late evening of February 17, 1968, Mr. John Chaney, Mr. Lester Mercer, Mr. Fred Buckley, and respondent Lloyd Powell were in a cocktail lounge when they decided to go to a liquor store and purchase some liquor (R.T. 132). Mr. Mercer purchased cigarettes and beer, and attempted to

give Mr. Buckley some change to buy a drink (R.T. 67). At this time Mrs. Parsons, who was clerking behind the counter, suspected Mr. Powell had stolen some wine, and she leaned over and asked Mr. Powell if he was going to pay for the wine (R.T. 68). At about the same time, Mr. Parsons came from the back room to confront Mr. Powell. Mr. Powell responded, "What wine? I have no wine," whereupon Mr. Parsons grabbed his jacket stating, "You're going to pay for the wine that you have under your coat or what are you going to do?" (R.T. 68). Mr. Powell struck or pushed Mr. Parsons (R.T. 12).

Mr. Parsons asked his wife for the gun that was kept at the counter (R.T. 12, 69). There is conflicting testimony by the state's two witnesses, Mr. Parsons and Mr. Buckley, as to whether Mr. Powell left the store immediately after the scuffle. Mr. Parsons claims when he next looked up with the gun in his hand Mr. Powell was no longer in the store. He did not see him leave (R.T. 12, 13). On the other hand, Mr. Buckley testified that he never saw Mr. Powell leave the store (R.T. 70).

There is further confusion between the state's two witnesses as to what happened after Mr. Parsons was given the gun by his wife. Mr. Parsons testified he then pointed the gun at Mr. Powell and cocked it (R.T. 16, 70). Mr. Parsons claimed that he purposefully shot out of the line of fire, and then dropped the gun when Mr. Powell kept advancing (R.T. 16, 17). Mr. Buckley testified that Mr. Powell grabbed Mr. Parsons' arm and, in the struggle the gun discharged (R.T. 70). According to Mr. Buckley, the gun was never dropped, but rather a struggle over the gun ensued (R.T. 71). In any event, there was a total of three discharges from this gun - one entered the ceiling, one wounded Mr. Parsons, and one killed Mrs. Parsons. At one point Mr. Parsons got another gun and shot Mr. Buckley in the arm (R.T. 22, 87). Buckley ran out of the store after being shot leaving only Mr. Parsons and his wife in the store.

On the following day, Officer Lattin of the Henderson, Nevada Police Department observed Mr. Powell and Mr. Chaney walking together in the parking lot of a shopping center during daylight business hours. At this time shops were open and other shoppers were present (R.T. 158). Officer Lattin knew nothing of the shooting in California, nor did he know anything suggesting Mr. Powell was connected with any other specific crimes. They "appeared" to look in the direction of his police unit. (R.T. 195). The two men "quickly" turned and walked in the opposite direction. They walked in a "rather rapid manner," and thereafter split apart. Officer Lattin made a U-turn, radioed for another unit to stop Mr. Chaney, and pulled up behind Mr. Powell. He honked his horn and thereafter stopped his vehicle, alighted, and ordered Mr. Powell to stop. When Mr. Powell heard the officer's command, he immediately stopped.

Officer Lattin told Mr. Powell to produce his identification. Mr. Powell explained that it had been stolen from him earlier. At Officer Lattin's request, Mr. Powell gave him his true name--Lloyd Charles Powell--and his birthdate. Officer Lattin ran a name check through the Henderson Police Department with a negative result (R.T. 198). When told to account for his presence, Mr. Powell explained that he had been staying with friends in Las Vegas and he was on his way to Michigan.

Officer Lattin conceded that Mr. Powell appeared to be of an age corresponding with the birth date given

by him. The officer admitted he had no reason other than his own "suspicious nature" (R.T. 205) to believe the name and birthdate were false. There is no testimony that Officer Lattin made any attempt to confirm any part of the information given to him by Mr. Powell by checking with Mr. Chaney or the officers who were assigned to stop him. In addition, there is no evidence whatsoever that there had been any recent crimes in the shopping center, that the shopping center was a high crime area, or that there had been any reports of suspicious prowlers. Nevertheless, Officer Lattin arrested Mr. Powell for vagrancy under Henderson's vagrancy ordinance. After the arrest, Officer Lattin searched Mr. Powell and found the alleged murder weapon in Mr. Powell's coat pocket. It had six expended shells in its chambers.

Mr. Powell was taken to the station and, when it was discovered that he was wanted in California, he was transferred to the County of San Bernardino, California where he was charged with first degree murder. The circumstances surrounding his arrest, the gun, and Mr. Powell's attempt to change his name at the station were all introduced at the trial (R.T. 214-25). The jury convicted Mr. Powell of second degree murder, and he was sentenced to from five years to life.

## I

## ARGUMENT

A STATE PRISONER WHO HAS EXHAUSTED HIS AVAILABLE STATE REMEDIES MAY ADJUDICATE HIS FOURTH AND FIFTH AMENDMENT CLAIMS BY FEDERAL HABEAS CORPUS.

Petitioner contends that so long as a defendant has had a fair opportunity to raise his claims in state courts, federal habeas corpus relief





should not be available to a state prisoner who complains of an unconstitutional search and seizure. The appropriateness of habeas corpus in such cases has been confirmed by this Court's recent decision in Lefkowitz v. Newsome, 43 U.S. L.W. 4284 (U.S. Feb. 19, 1975). It would, therefore, be inappropriate to grant certiorari to again consider a question so recently and clearly settled by this Court.

## II

EVEN IF THE HENDERSON ORDINANCE IS NOT CONSTITUTIONALLY INFIRM, THE ARREST OF APPELLANT UNDER THE ORDINANCE WAS WITHOUT PROBABLE CAUSE AND, THEREFORE, VIOLATED HIS FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES.

It would not be appropriate for this Court to grant certiorari in order to review any of the questions presented by petitioner because on the facts of this case there was clearly no probably cause to arrest under the Henderson ordinance[1/]. Since the judgment of the Ninth Circuit would be affirmed on this ground, it would not be necessary to consider the broader issues involving the constitutionality of the statute.

It is somewhat unrealistic to discuss the existence of probable cause to arrest under the Henderson ordinance since, as discussed infra, the ordinance itself authorized arrest on less than probable cause. In addition, the elements of the offense are so vague that

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1/ The Henderson ordinance reads:

Every person is a vagrant who:
Loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by a police officer to do so if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.



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one cannot clearly decide with a reasonable degree of certainty exactly what the officer must have probable cause to believe before arresting. Assuming for the purpose of argument that the ordinance is sufficiently definite, the arresting officer did not have probable cause to believe that Mr. Powell had violated any of the elements of the vagrancy ordinance.

Before an officer is warranted in arresting a suspect for vagrancy under the ordinance, the officer must have probable cause to believe that:

1) the suspect is loitering or wandering from place to place without apparent reason or business;

2) the suspect must refuse to identify himself and refuse to account for his presence when so requested by the officer; and

3) the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identificaton.

None of the above three elements were established by Officer Lattin prior to the arrest of Mr. Powell.

Although the Ninth Circuit did not reach the question of probable cause to arrest under the ordinance, the Court correctly summarized the facts surrounding the arrest as follows:

> The arresting officer saw appellant and a companion walking across a parking lot in a shopping center. It was 10 o'clock Sunday morning. The adjacent stores were open and there were cars on the lot. The arresting officer knew nothing of the shooting in California the night before. There is nothing to suggest that he connected appellant with any other specific crime. He testified that appellant and his companion "appeared" to look at the police car, then "quickly" turned and walked in the opposite direction. They walked "in a





> rather rapid manner," occasionally looking back. When the police car turned and followed, the two men separated and walked in different directions. The officer followed appellant, and honked the patrol car horn. Appellant did not stop. The officer got out of his car and said, "Wait a minute." Appellant stopped. The officer asked if appellant had any identification. Appellant said he did not, that it had recently been stolen. The officer asked his name; appellant gave it. The officer asked appellant where he was staying. Appellant responded that he was staying with friends in Las Vegas (approximately eight miles north of Henderson), but he could not provide the name or address. The officer asked appellant where he was going. Appellant said he was en route to Michigan; the officer testified that Henderson is south of Las Vegas and not east on the most direct road to Michigan. He arrested appellant because appellant "had no real answer as far as where he had been staying nor the friends that he was with nor could [he] give me a reason for being in the Henderson area. . . ." After the arrest the officer conducted the search complained of. 507 F.2d at 95 n.2

With respect to the first element of the offense, it is clear that this brief observation of two people walking together in an open shopping center is an insufficient basis to form a reasonable belief that they were loitering or wandering from place to place without apparent reason or business. Certainly many people must walk about in the shopping center and its parking lot, changing direction frequently. Likewise, many citizens would undoubtedly "appear" to look in the direction of a cruising police unit, and if the officer also "appeared" to be looking at them and made a U-turn, the citizen would no doubt continue to direct his attention towards the police officer.

Officer Lattin testified that he was suspicious of Mr. Powell because he could not recognize him. This

This is quite understandable considering considering Henderson had an approximate population of 16,000 people and the shopping center where Mr. Powell was arrested is bordered by a major interstate highway, U.S. 93. In fact, Henderson is between Hoover Dam and Las Vegas on U.S. 93. Local casinos advertise Henderson as a place to stop for tourists on their way to see that world famous construction. (C.T. 141).

With respect to the second element of the offense, the simple fact is that Mr. Powell did identify himself and account for his presence. He gave his true name and age. Officer Lattin testified that Mr. Powell appeared to be a man of the approximate age given. He ran a name check on Mr. Powell, and the result was negative. Officer Lattin did not even try to confirm the validity of the name with Mr. Powell's companion, Mr. Chaney. Officer Lattin testified that he had no reason other than his own "suspicious nature" (R.T. 205) to believe the name and birthdate were false.

Mr. Powell accounted for his presence by telling Officer Lattin that he stayed with some friends in Las Vegas for a few days and he was on his way to Michigan. The officer had no reason to doubt the fact that Mr. Powell was going to Michigan, and Mr. Powell's statements were in no way contradictory. Henderson is only eight miles from Las Vegas. Although Henderson is smaller than Las Vegas, both cities are gambling and entertainment meccas relying to a large extent, if not primarily, on out of state, transient business. (C.T. 141). The nature and proximity of the cities belies any contention that





someone bound for Michigan might not find himself temporarily in Henderson.

Mr. Powell was arrested merely because he did not give the exact number of days he had spent in Las Vegas and because he could not give the name and address of his friends there. Neither of these facts would seem unusual for one in transit from one state to another. In addition, it would seem unreasonable to arrest someone for failure to account for his presence on the grounds that he did not know how many days he had been somewhere else.

Nothing in the transcript indicates that public safety demanded Mr. Powell's identification. There was no evidence that this shopping center was an area of high incidence of crime, nor had there been any reports of recent crimes or suspicious prowlers. The only indication that there was anything differentiating Mr. Powell from his fellow shoppers was that Officer Lattin testified petitioner and his companion "appeared to look at my police unit" and then walked the other way, subsequently parting company. (R.T. 195). Every day there must be many shoppers in the center who look at the unit and walk in the opposite direction. Certainly they are not all potentially subject to stop and arrest for this innocuous conduct.

This Court has held that conduct, like Mr. Powell's manner of walking, which might be characterized as "furtive" by an officer, is insufficient for an arrest and search unless the officer can couple the conduct with "specific knowledge . . . relating the suspect to the



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evidence of a crime." Sibron v. New York, 392 U.S. 40, 66-67 (1968). Officer Lattin stated that he had no such specific knowledge. He had only his own "suspicious nature." (R.T. 205) Unless the probably cause requirement is to be abandoned altogether, a police officer's suspicious nature may not be used as a substitute for the specific, articulable facts creating a reasonable belief that the defendant is guilty of a crime. Since there was no probable cause for the arrest, the evidence seized in the search must be suppressed. Mapp v. Ohio, 367 U.S. 643 (1961)

## III

THE HENDERSON ORDINANCE IS UNCONSTITUTIONAL BECAUSE IT IS VAGUE AND BECAUSE IT AUTHORIZES ARREST AND CONVICTION ON LESS THAN PROBABLE CAUSE TO BELIEVE THAT A CRIME HAS BEEN COMMITTED.

According to recent decisions of this Court and other state and federal courts, the constitutional deficiencies of the Henderson ordinance are so apparent that it would be an inappropriate allocation of judicial effort to grant certiorari on this issue. In fact, this Court has declined to review two recent decisions striking down a similar New York vagrance law statute. Lefkowitz v. Newsome, 43 U.S. L.W. 4284, 4285 (U.S. Feb. 19, 1975); People v. Berk, 32 N.Y.2d 567, 300 N.E. 2d 411, cert. denied, 414 U.S. 1093 (1973). Without attempting fully to brief the matter, some of the reasons for the ordinance's invalidity are outlined below.

The ordinance is unconstitutionally vague on its face and as applied.





The Henderson ordinance reads:

> Every person is a vagrant who: Loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by a police officer to do so if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

The offense of vagrancy under the ordinance constitutes the conjunction of three broad elements: (1) "loiter[ing] or wander[ing] upon the streets. . . without apparent reason or business," (2) "refusing to identify himself and to account for his presence," and (3) "surrounding circumstances. . . such as to indicate to a reasonable man that the public safety demands such identification."

The first element of this offense is strikingly similar to a similar Florida vagrancy ordinance which this Court held unconstitutionally vague on its face. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). The offending language in the Jacksonville ordinance read in part

> [P]ersons wandering or strolling around from place to place without any lawful purpose or object. . . shall be deemed vagrants. . . . 405 U.S. at 156-57 n. 1

This Court struck down the ordinance because it was

> void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' United States v. Harriss, 347 U.S. 612, 617, and because it encourages arbitrary and erratic arrests and convictions. Thornhill v. Alabama, 310 U.S. 88; Herndon v. Lowry, 301 U.S. 242.

This Court went on to say that by criminalizing "wandering or strolling" the statute included conduct extolled by Walt Whitman and Rachel Lindsay. The law also included within its ambit innocent activities which are part of the amenities of life as we have come to know it. The law provides no guidelines by which enforcement authorities may distinguish between innocent and unlawful conduct, and, by allowing arrest and conviction on suspicion, it invited arbitrary and erratic application by placing almost unfettered discretion in the hands of the police.

One year prior to Papachristou, this Court unanimously held that the phrase "without visible or lawful business," as applied to someone discharging a woman (whose name he claimed not to know) from his automobile late at night, under somewhat suspicious circumstances, was unconstitutionally vague as applied. Palmer v. City of Euclid, 402 U.S. 544 (1971). Two of the justices would have held it unconstitutional on its face. If the Euclid ordinance was unconstitutionally applied under the suspicious circumstances of the Palmer case, then certainly the phrase "without apparent reasons or business" (a broader and more vague injunction than the Euclid ordinance) is unconstitutional if applied to a citizen walking with a companion in a shopping center during daylight business hours.

The second element of the Henderson ordinance (that of refusing to identify himself and to account for his presence) suffers from the same infirmities of vagueness. Assuming for purposes of argument that the





phrase "identify himself" is sufficiently clear, the ordinance is written in the conjunctive and requires that the suspect also "account for his presence." This latter phrase would be a nullity if any account, no matter how bizarre or unreasonable, were to satisfy the requirements of the statute, so it must be that something further is required--either a "good" account, or a "satisfactory" account, or an account "satisfactory to the officer."[2/] Since the Henderson statute does not designate what kind of account is required, it is even more vague than similar "good" or "satisfactory" account statutes that have been struck down in other cases. See Ricks v. District of Columbia, 414 F.2d 1097, 1104-05 (D.C. Cir. 1968); Baker v. Binder, 274 F. Supp. 658, 664 (W.D. Ky. 1967); United States v. Margeson, 259 F. Supp. 256, 268-69 (E.D. Pa. 1966). Fifth amendment considerations aside, such statutes suffer from the same deficiencies as those decried by this Court in Papachristou--they fail to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, and they encourage arbitrary and erratic arrests and convictions.

In Papachristou itself, this Court quoted with approval from President Roosevelt's message vetoing a proposed District of Columbia "account" statute and his reasoning that

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2/ It is clear that the arresting officer believed he had a right to demand an account which was satisfactory to him. Officer Lattin testified that he arrested Mr. Powell "due to the fact that the subject had no real answer as far as where he had been staying nor the friends that he was with nor could give me a reason for being in the Henderson area, I consequently did place him under arrest." (R.T. 199) (Emphasis added).

> "[w]hile this phraseology may be suitable for general purposes as a definition of a vagrant, it does not conform with accepted standards of legislative practice as a definition of a criminal offense. . . . It would hardly be a satisfactory answer to say that the sound judgment and decisions of the prosecuting officers must be trusted to invoke the law only in proper cases." 405 U.S. at 166-67 n. 10

The final element of the offense under the Henderson ordinance ("surrounding circumstances. . . indicate to a reasonable man that the public safety demands such identification") provides even less guidance to the citizen than the first two elements. The ordinance does not provide that the citizen must know what circumstances give rise to the officer's suspicion, nor does it provide that the officer is to inform the citizen. Thus, an element of the crime is something beyond both the citizen's control and the citizen's knowledge. In addition to providing no notice to the citizen, the third element of the offense suffers from the same vagueness deficiencies as the first two elements. Words and phrases like "surrounding circumstances," "indicate to a reasonable man," "public safety," and "demands," are so vague that they permit arrests and convictions for purely innocent conduct. A more narrowly drawn New York statute ("circumstances which justify suspicion that [a person] may be engaged or about to engage in crime") was struck down in United States ex rel. Newsome v. Malcolm, 492 F.2d 1166, 1173 (2d Cir. 1974).[3/]

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3/ Although this Court reviewed the case on another issue, this Court declined to grant certiorari on the issue of the New York statute's constitutionality. Lefkowitz v. Newsome, 43 U.S.L.W. 4284, 4285 (U.S. Feb. 19, 1975). Likewise, this Court declined to review the New York Court of Appeal when it struck down this same statute as being vague and in violation of the right against self-incrimination and the privileges and immunities clause. People v. Berk, 300 N.E.2d 411, 32 N.Y.2d 567, cert. denied, 414 U.S. 1093 (1973).



The Henderson ordinance violates the Fourth Amendment because it authorizes arrests and convictions on less than probable cause.

It is elementary that an arrest, to be valid, must be based on probable cause. United States ex rel. Newsome v. Malcolm, supra, 492 F.2d at 1172. See also Papachristou, supra, 405 U.S. at 169-70; Hall v. United States, 451 F.2d 831 (D.C. Cir. 1972)(en banc), noted in 47 N.Y.U.L. Rev. 595 (1972) and 18 Vill. L. Rev. 117 (1972). The Henderson ordinance negates the probable cause requirement in two ways. First, by defining the offense in vague terms, it is not possible for the citizen or the officer to determine whether or not there is probable cause to believe that each element of the offense has been committed. Hall v. United States, supra, 459 F.2d at 837. Secondly, by criminalizing suspicious conduct the ordinance authorizes a full custodial arrest and conviction under circumstances which constitutionally justify no more than an investigative stop. Terry v. Ohio, 392 U.S. 1 (1968). Obviously, a state may not accomplish an end-run around the limited investigatory stop authorized in Terry by merely making it a crime to be a suspicious charactor, and then arresting and searching pursuant to the arrest for the crime. Newsome, supra, 492 F.2d at 1173. See Henry v. United States, 361 U.S. 98, 101, 104 (1959), Papachristou, supra at 546 (concurring opinion of Stewart, J.)

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IV

BY REQUIRING A SUSPICIOUS PERSON TO IDENTIFY HIMSELF AND TO ACCOUNT FOR HIS PRESENCE, THE HENDERSON ORDINANCE VIOLATES THE FIFTH AND FOURTEENTH AMENDMENT RIGHT NOT TO INCRIMINATE ONESELF.

Since the Ninth Circuit found the Henderson ordinance unconstitutionally vague, the Court did not reach respondent's argument that the clause requiring the suspect to "identify himself and account for his presence" violated the suspect's right to remain silent. Assuming, however, that the phrase "to identify oneself and to account for one's presence" has a sufficiently definite meaning to meet constitutional standards, by making silence an element of the offense, the ordinance makes the exercise of one's constitutional right not to incriminate oneself an element of the crime for which the suspected vagrant is arrested.

Since the unconstitutionality of doing so is clearly supported by this Court's prior decisions,[4/] and there is no conflict among the Circuit's on the point, it would not be appropriate to grant certiorari on this issue. In fact, this Court denied certiorari in a recent case striking down a similar vagrancy statute because, inter alia, it violated the right against self-incrimination. People v. Berk, 32 N.Y.2d 567, 300 N.E.2d 411, cert. denied, 414 U.S. 1093 (1973).

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4/ Brooks v. Tennessee, 406 U.S. 605 (1972); California v. Byers, 402 U.S. 424, 434 n.6 (1971); Davis v. Mississippi, 394 U.S. 721, 727 n.6 (1969); Leary v. United States, 395 U.S. 6 (1969); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968); Marchettii v. United States, 390 U.S. (1968); Spevak v. Klien, 385 U.S. 511 (1967); Terry v. Ohio, 392 U.S. 1, 34 (1967) (concurring opinion of White, J.); Miranda v. Arizona, 384 U.S. 436 (1966); Murphy v. Waterfront Commission 376 U.S. 52 (1963).





V

EVIDENCE SEIZED PURSUANT TO AN ARREST UNDER A STATUTE WHICH VIOLATES THE FOURTH AND FIFTH AMENDMENTS SHOULD BE SUPPRESSED.

Petitioner asks this Court to grant certiorari in order to establish a rule that a city counsel may adopt an unconstitutional ordinance defining a crime which violates both the Fourth and Fifth Amendments, and then allow the prosecuting authorities to use any evidence seized in searches pursuant to arrests for the unconstitutional crime. Petitioner argues that the Ninth Circuit's opinion in this case conflicts with the Fifth Circuit's decisions in United States v. Kilgen, 445 F.2d 287, 289 (5th Cir. 1971), and United States v. Dameron, 460 F.2d 294 (5th Cir. 1972). However, as the Ninth Circuit pointed out (507 F.2d at 98), this conflict is more apparent than actual. Since both Fifth Circuit cases involved consent searches, the courts' statements that evidence seized under an unconstitutional statute should not be suppressed is merely dictum. Moreover, the dictum is at best ill-considered since the Fifth Circuit neither addressed the arguments set out below, nor cited any of this Court's decisions to the contrary. In addition, whatever doubt may have existed about the propriety of suppressing evidence seized under an unconstitutional statute at the time of the Kilgen and Dameron cases has been resolved by this Court's subsequent decision in Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (suppressing evidence seized in compliance with federal statute).

In numerous cases this Court has held that in spite of the good faith of a searching officer or his

strict compliance with a statute, if the statute or underlying basis for the search is unconstitutional the evidence must be suppressed. In Almeida-Sanchez v. United States, 413 U.S. 266 (1973), this Court suppressed evidence discovered by immigrating officers even though the search was made in strict compliance with Section 287(a) of the Immigration and Nationality Act, 8 U.S.C. §1357(a), and the regulations promulgated thereunder. This Court stated that "it is clear, of course, that no Act of Congress can authorize a violation of the Constitution." Id. at 272. In Whiteley v. Warden, 401 U.S. 560 (1971), this Court rejected the argument that an arrest was valid because the arresting officer relying in good faith on a police bulletin indicating the defendants were wanted, made an arrest. The good faith and probable cause of the arresting officer could not be used as a shield against inquiry into the underlying constitutionality of the arrest. In Coolidge v. New Hampshire, 403 U.S. 443 (1971), this Court held that whether or not probable cause existed, a search pursuant to a warrant issued by the Attorney General under authority of a state statute was invalid. Likewise, in Berger v. New York, 388 U.S. 41 (1967), the Court suppressed evidence seized in compliance with New York's wire tap law.

Petitioner attempts to distinguish this line of cases on the ground that the statutes relied upon by the officers "dealt directly with the standard and procedures governing searches and did not attempt to define a substantive crime. In short, each involved legislative encroachment upon Fourth Amendment rights." (Petitioner's Brief pp. 17-18). This distinction is





illusory since, as the Ninth Circuit pointed out, the very reason that the Henderson ordinance is unconstitutional is because it is a legislative encroachment upon the Fourth Amendment. It authorizes arrest and search for conduct which at the most would justify only a brief investigatory detention. In addition, the vagueness of the ordinance trenches on Fourth Amendment rights because it negates the probable cause requirement by making it impossible for the officer or citizen to answer the question "probable cause for what?" Obviously, a statute making it a crime to be a suspicious person could not stand on any better footing than a statute authorizing the arrest and search of suspicious persons.

Petitioner relies heavily on Pierson v. Ray, 386 U.S. 547 (1967). Pierson is clearly not in point because it involved a damage action against police officers who made arrests under a statute later declared unconstitutional. In holding that good faith and probable cause is a defense to an action under the Civil Rights Act of 1871 (42 U.S.C. §1983), this Court quite properly held that a police officer's lot is not so unhappy as to force him to become an insurer of the constitutionality of legislation. It simply does not follow that since a police officer cannot be forced to respond in damages, unconstitutionally seized evidence may be used with impunity. Neither in Pierson, nor in the subsequent cases cited above did this Court suggest that the Pierson rule should have any impact whatsoever on the exclusionary rule.

Not only is the appropriateness of the exclusionary rule so clear that is was assumed in the

line of cases culminating in Almeida-Sanchez, supra, but the basic rationale underlying the rule indicates that it is even more appropriate when the incursion on the Fourth and Fifth Amendment is accomplished legislatively by the city counsel. While one might be inclined to forgive a constable's blunder made under circumstances requiring quick and uncounseled judgment, a well counseled legislative encroachment on constitutional freedoms should not be given the imprimatur of the judiciary by allowing the unfettered use of the fruits of such an invasion. Terry v. Ohio, 392 U.S. 1, 12-13 (1968); Elkins v. United States, 364 U.S. 206, 222-23 (1960). "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." Mapp v. Ohio, 367 U.S. 643, 659 (1961).

Not only is unconstitutional legislation more highly visible to the public at large than a policeman's misconduct, but also the existence of such statutes has an impact on the security and well being of the public reaching far beyond the individual case. It is impossible to say how many thousands of innocent citizens have been harassed under the command of laws like the Henderson ordinance. Almeida-Sanchez, supra, at 173 n.5. Nor is it possible to measure the impact on the quality of life similar laws have had on others who wished only to walk upon the streets in enjoyment of the amenities of life in this country. Papachristou, supra, 405 U.S. at 164. As the Ninth Circuit correctly observed, legislators no less than policemen must be deterred from violating the



constitutional rights of citizens. 507 F.2d at 98; 47 N.Y.U.L Rev. 595, 602, 604 (1972).

The deterrence rationale underlying the exclusionary rule is even more appropriate when the constitutional violation is legislative than it is when the violation is the isolated conduct of an individual officer. One of the reasons given for adoption of the exclusionary rule was the lack of any other realistic remedy, such as damages against the officer. Mapp v. Ohio, supra, 367 U.S. at 651-53, 670. When the constitutional violation is legislative, not only are the practical problems of a damage remedy as insurmountable, but there is neither a right to sue the officer (Pierson, supra), nor a right to sue the legislators. Barr v. Matteo, 360 U.S. 564 (1959); Tenney v. Brandhove, 341 U.S. 367 (1951); See Monroe v. Pape, 365 U.S. 167 (1961).

It would be naive to adopt petitioner's suggestion that declaring the statute unconstitutional in a prosecution for vagrancy would be a sufficient deterrent. If this rule were adopted, the likelihood that the law would ever be tested is extremely slim. Vagrancy laws have traditionally been used as a pretext temporarily to remove undesirables from the street or to search for evidence of other crimes. In order to insure the continued ability of the police to make such arrests and searches under the vagrancy law, prosecutors would simply release the citizen after he has spent the night in jail, or, as was done in the present case, prosecute for the substantive crime revealed by the search.

This simple lesson has not been lost on police and prosecutors. For example, in People v. Williams, 55 Misc. 2d 774, 286 N.Y.S.2d 575 (New York City Crim. Ct. 1967) the court said

> these defendants are 41 of a group of alleged prostitutes who have been arrested and detained 2500 times for disorderly conduct and loitering in New York City since August 18th. . . . This Court of its own knowledge is aware that except for a few isolated instances where defendants pleaded guilty, the disorderly conduct cases were dismissed. In many instances, "the girls" were arrested after 11:30 P.M., too late to be arraigned, . . . then kept overnight in a cell. In the morning they were brought to Court and released because the offenses for which they had been arrested could not be proven to have been committed by them. 286 N.Y.S.2d at 577.

The Williams case was cited with approval by the Second Circuit in United States ex rel. Newsome v. Malcolm, supra, at 1173. After holding the New York disorderly conduct statute unconstitutional, the Second Circuit held that the evidence seized pursuant to an arrest under the statute must be suppressed. This Court affirmed the Second Circuit, but did not grant certiorari on this precise issue. Lefkowitz v. Newsome, 43 U.S.L.W. 4284, 4285 (U.S. Feb. 19, 1975).

Since arrest and search is the primary aim of those enforcing the vagrancy law, conviction for the substantive offense becomes unimportant. Viewed in this light, as a practical matter vagrancy laws are not laws defining substantive crimes, but are laws authorizing unconstitutional arrests and searches. It is not only probable, but likely that such laws could remain on the





books indefinitely.[5/]

Even if this Court were to adopt a general rule that evidence seized in searches under an unconstitutional statute should not be suppressed, nevertheless Mr. Powell should be entitled to have the evidence suppressed in his case. He is the first to have successfully challenged the constitutionality of this law, and as such, he is entitled to the fruits of his victory.[6/] The retroactive effect, if any, of the Ninth Circuit's opinion in this case should be left until it is squarely presented in another case.

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5/ They could remain on the books at least until such time as a citizen with appropriate standing had both the assets and the Quixotic idealism to pursue an injunctive or declaratory relief civil rights claim against the police. Anderson v. Nemetz, 474 F.2d 814, 817, 821 (9th Cir. 1973) (civil rights action holding a "roams about from place to place without any lawful business" statute so clearly unconstitutional that it is "no longer a litigable issue . . . .") Given the impecunious and parapetic class of people who bear the brunt of vagrancy laws (Douglas, Vagrancy and Arrest on Suspicion, 70 Yale L.J. 1, 4, 13 (1960)), and the unavailability of a damage remedy, such civil actions would be rare indeed.

6/ "Lawyers are meant to serve their clients, and they cannot at the same time serve the growth of the law if they know that time spent and emphasis expended upon novel or potentially disruptive points of law are unlikely to advance their client's interests." Gaither v. U.S. 413 F.2d 1061, 1085 (D.C. Cir. 1969). In Hall v. United States, 459 F.2d 831 (D.C. Cir. 1972), the court held that evidence seized under an unconstitutional statute should be suppressed since the defendant should get the benefit of the ruling even though others may not.

## VI

INTRODUCTION OF THE DEATH WEAPON WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

It would not be appropriate for this Court to grant certiorari in order to review the question of harmless error, since there is no conflict among the circuits on the point, there are no important questions of law presented, and this Court's opinion would have no impact beyond the facts of the present case. In addition, the Ninth Circuit's opinion on the question is clearly correct.

Both the California Court of Appeal and the Federal District Court applied the wrong test for harmless error and, not surprisingly, they reached a wrong result. As the Ninth Circuit pointed out

> Both the California District Court of Appeal and the court below concluded that in light of other evidence in the record, the testimony regarding appellant's possession of the murder weapon in Nevada "was not required to establish any element of the crime charged." That is not the test. The question is whether it is ". . . possible for us to say that the State has demonstrated, beyond a reasonable doubt, that the [admission of the unlawfully seized evidence] did not contribute to [appellant's] conviction. . . ." Chapman v. California, supra, 386 U.S. at 26. In good conscience, we are unable to do so. 507 F.2d at 99.

One of the most hotly contested issues at the trial was the degree of the crime, if any. The jury could have returned verdicts of not guilty (either because Mr. Powell did not commit the crime, or because of self-defense or accident), involuntary manslaughter, voluntary manslaughter, second degree murder, or first degree murder. The seizure of the murder weapon from Mr. Powell in Henderson not only allowed the prosecutor to argue that Mr. Powell was the perpetrator of the crime, but also allowed the prosecutor



to demonstrate the trigger pull on the weapon to the jury. He even invited the jury to pull the trigger in order to show that "[i]t doesn't fire accidentally and it doesn't hit people accidentally either." In determining the degree of the crime, the trigger pull on the death weapon was one of the most important items of evidence in the case. Since it also appeared that the gun had been fired three times since Mr. Powell had left the liquor store, it cannot be said beyond a reasonable doubt that the evidence did not contribute to the conviction.

## CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Robert W. Peterson
Attorney for Respondent

Dated: 3/18/75

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Supreme Court, U. S.
FILED
AUG 29 1975
MICHAEL RODAK, JR., CLERK

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1975

## No. 74-1055

W. T. STONE, WARDEN,
*Petitioner,*

VS.

LLOYD CHARLES POWELL,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1975

No. 74-1055

W. T. STONE, WARDEN,
*Petitioner,*

vs.

LLOYD CHARLES POWELL,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR THE PETITIONER

### OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit appears as Appendix A to the Petition for Writ of Certiorari and is reported at 507 F.2d 93; the unreported memorandum opinion and order of the United States District Court for the Northern District of California appears as Appendix B to the Petition.

### JURISDICTION

The judgment of the court of appeals was entered on December 4, 1974. The Petition for Writ of Cer-

tiorari was docketed in this Court on February 22, 1975, and granted on June 30, 1975. The jurisdiction of this Court is conferred by Title 28, United States Code section 1254(1).

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**QUESTIONS PRESENTED**

1. Whether the purposes of the exclusionary rule are served by suppressing evidence seized during the incidental search of the respondent by a police officer who had probable cause to believe that the respondent had violated a then-valid ordinance; or whether reasonable reliance upon a coordinate branch of government by a police officer should foreclose the application of the exclusionary rule.

2. Whether the Fourth Amendment claims of a state prisoner should be cognizable under 28 U.S.C. § 2254.

a. Whether *Kaufman v. United States,* 394 U.S. 217 (1969), should be overruled to the extent that it permits state prisoners, who have been afforded a fair opportunity in the state courts to litigate their Fourth Amendment claims, to relitigate those questions on federal habeas corpus.

b. Whether, in light of the fact that the District Court found that the Henderson, Nevada, police officer had probable cause to arrest respondent for violation of an ordinance which at the time of the arrest had not been authoritatively determined to be unconstitutional, respondent's claim that the gun discovered as a result of a search incident to that arrest



violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution is one cognizable under 28 U.S.C. § 2254.

3. Whether the vagrancy ordinance of Henderson, Nevada, is constitutional.

4. Whether the admission of the evidence, even if unlawfully seized, was error harmless beyond a reasonable doubt.

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**STATEMENT OF THE CASE**

**A. Proceedings in the state courts.**

On June 6, 1968, Lloyd Charles Powell, respondent herein, was convicted by a jury after trial in the Superior Court of San Bernardino County, California, of murder in the second degree in violation of California Penal Code section 187. He was sentenced to State prison for a term of from five years to life. On October 7, 1969, the California Court of Appeal, Fourth Appellate District, Division Two, affirmed the judgment in an unpublished opinion which appears as Appendix C to the Petition for Writ of Certiorari. Respondent's petition for writ of habeas corpus was denied by the California Supreme Court on July 1, 1970.

**B. Proceedings in the federal courts.**

On August 24, 1971, Powell filed an amended petition for writ of habeas corpus in the United States District Court for the Northern District of California. On February 8, 1972, the district court filed an order denying the petition.

An order granting a certificate of probable cause to appeal having been issued by the district court on February 22, 1972, respondent appealed to the United States Court of Appeals for the Ninth Circuit. On December 4, 1974, the court of appeals filed its opinion reversing the judgment of the district court and remanding the matter to the district court for further proceedings.

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## STATEMENT OF THE FACTS

On February 18, 1968, Gerald and Mary Parsons managed the Bonanza Liquor Store located at 1052 West Fifth Street in San Bernardino, California. About midnight, Mr. Parsons, working in a rear office, heard the bell at the store's entrance. He looked through a one-way glass in the wall separating the office from the store to see that four men had entered (Tr. 7-11, 27). The men were Fred Buckley, John Chaney, Lester Mercer and respondent Lloyd Charles Powell (Tr. 66, 133, 164).

While Mercer was purchasing cigarettes and beer from Mrs. Parsons, who was behind the counter (Tr. 9, 67), respondent removed a bottle of wine from a shelf and concealed it under his jacket. Parsons approached respondent, asking, "What about that wine?" Respondent queried, "What wine?" Mrs. Parsons replied, "That wine under your jacket" (Tr. 11). Mr. Parsons opened respondent's jacket, exposing a half-gallon bottle of wine. Respondent then struck Mr. Parsons in the mouth with his fist as Mercer blocked the store manager's way (Tr. 11, 29, 32, 36-37).



Two of the men, apparently Chaney and Mercer, left the store (Tr. 12, 135, 169-70). Respondent quickly followed. Mr. Parsons then asked his wife for a .38 caliber revolver which was kept near the cash register (Tr. 12). Respondent soon returned, advancing toward Mr. Parsons, who pointed the gun at his assailant. When respondent did not stop, Mr. Parsons cocked the gun, "raised it out of the line of anybody," and discharged the revolver into the ceiling (Tr. 16).

Mr. Parsons then discarded the gun behind the ice cream freezer, but respondent rushed past him and seized the weapon. Mr. Parsons heard an "explosion" and discovered a bullet wound in his right wrist (Tr. 17).

The store manager ran for another gun which he kept in the store office. While searching for the weapon he heard, in succession, a shot ring out, his wife scream, and the cash register drawer open. He returned to the store to discover Buckley leaning over the cash register. Buckley fled when Parsons fired a shot at him (Tr. 18-19). Mrs. Parsons was lying behind the counter, a bullet wound below her neck (Tr. 23-24). Mr. Parsons testified that, once he discarded the .38 revolver, he saw only respondent handle it (Tr. 24).

Buckley, Chaney, and Mercer gave testimony which differed only slightly from that of Mr. Parsons. All three men stated that respondent accompanied them to the liquor store (Tr. 66, 133, 164). Buckley stated that he saw respondent strike Mr. Parsons. The store

manager then secured a gun from his wife and pointed it at respondent, who grabbed Mr. Parsons' arm, causing the gun to discharge into the ceiling (Tr. 70). Mr. and Mrs. Parsons and respondent struggled for the gun which consequently fell from Mr. Parsons' hand (Tr. 72). Buckley then saw respondent holding the pistol and heard the report of a gun shot. Mrs. Parsons fell to the floor. The gun discharged again, wounding Mr. Parsons in the arm (Tr. 85-86).

San Bernardino Police Officer Donald Covey later took a statement from Buckley at San Bernardino County Hospital (Tr. 161). Buckley told the officer that respondent had hidden a bottle of wine under his coat, the manager spotted it, respondent took possession of the gun and "shot the manager's wife and, then, the manager" (Tr. 161-62).

Lester Mercer apparently saw little of the confrontation in the liquor store. After paying for his beer, Mercer heard Mrs. Parsons ask respondent if he was going to pay for the wine he had taken. Respondent denied that he had taken wine, but Mercer saw a bulge beneath his coat (Tr. 133-34, 143). An argument ensued; Mrs. Parsons reached for a gun (Tr. 134). She handed the weapon to her husband who began to wave it. Mercer turned to leave the liquor store, intending to seek help (Tr. 135). As he left the store, Mercer heard a shot fired (Tr. 136). However, he saw no one injured by the shot (Tr. 151).

John Chaney testified that, as he, Mercer, and Buckley were pooling their funds to purchase vodka, he



heard Mrs. Parsons ask respondent, "What about that wine?" When respondent denied that he had wine, Mr. Parsons grabbed his coat, causing him to drop the bottle to the floor. Chaney testified that he offered to pay for the broken bottle, but respondent had shoved Mr. Parsons, who asked his wife for the gun (Tr. 165-67). Mrs. Parsons was throwing objects at respondent as he and her husband were "wrestling" (Tr. 169). The gun discharged during the scuffle, and respondent grabbed it. Respondent was in possession of the gun as Chaney fled from the store (Tr. 169).

San Bernardino Police Officer Bradford Hilder arrived at the Bonanza Liquor Store at 12:15 a.m. on February 18, 1968, but observed no broken wine bottles within the store. However, he did find a full half-gallon bottle of Gallo Wine outside the store 225-28, 260).

At 10:10 a.m. on February 18, 1968, Officer Edward Lattin of the Henderson, Nevada, Police Department was on routine patrol in a marked police car near the parking lot of a shopping center near the City of Henderson. He saw two men, one of whom was respondent, look at his police car and turn quickly, walking in the opposite direction (App. 5). The men looked back toward the police vehicle while continuing to walk rapidly. The officer made a U-turn and approached them. The men then split apart, walking in opposite directions. The officer followed respondent and directed him to halt. Respondent failed to do so, continuing to walk rapidly toward the rear of a department store. The officer finally stepped

from his vehicle and ordered respondent to stop. Respondent complied (App. 6-7).

Officer Lattin asked respondent for identification. He replied that his identification papers had been stolen. In response to further questions, respondent said that his name was Lloyd Charles Powell and that his date of birth was January 6, 1947. The officer checked respondent's name through the records of the Henderson Police Department but discovered nothing (App. 8). Respondent told Officer Lattin that he had been staying "with friends in Las Vegas" but was unable to give their names or addresses (App. 8). He explained only that he had been in Las Vegas "for the past few days" (App. 16) and that he was en route to Michigan (App. 9). Henderson is eight miles south of Las Vegas; a person traveling from the latter city to Michigan would proceed east and would not pass through Henderson (App. 12, 27-28). Officer Lattin arrested respondent for violation of the Henderson Vagrancy Ordinance (App. 9). A search incident to the arrest disclosed in the pocket of respondent's coat a pistol with six expended cartridges in the cylinder (App. 18-19).

Mary Parsons died at 5:45 a.m. on February 18, 1968 (Tr. 184). A lead slug was removed from the lung of the body on the same day. Examination of the slug and bullets fired from the gun found on respondent's person disclosed a high degree of similarity of individual striation markings. This similarity led Criminalist John Davidson to testify that the bullets were fired from the same weapon (Tr. 235-40).



## SUMMARY OF ARGUMENT

In February 1968, respondent was arrested in Henderson, Nevada, upon probable cause to believe that he had violated that municipality's vagrancy ordinance, whose validity had never been challenged. An incidental search revealed the weapon which he had used to murder a woman in San Bernardino, California. Almost seven years after the arrest, the court of appeals held that the ordinance was unconstitutionally vague and that its vagueness dictated suppression of the evidence and, consequently, a new murder trial for respondent in California state court. The reasons given for the application of the exclusionary rule to set aside respondent's conviction were to deter legislative enactment of unconstitutional statutes and to preserve the integrity of the state judiciary.

We argue that no tenable purpose could possibly be served by the suppression of evidence in this case. It could not deter police misconduct, the prime purpose of the exclusionary rule, because there was no "misconduct" under any definition of that word. The arrest was based upon probable cause and the arresting officer reasonably and in good faith relied upon the presumptive validity of the ordinance. Exclusion of evidence in this case would only cause police officers to be reluctant to enforce laws whose validity had not been authoritatively determined. The detrimental effect upon the vigorous and uniform enforcement of the law is obvious and intolerable. We contend, therefore, that evidence found by police who

reasonably and in good faith rely upon a coordinate branch of the government—the legislature of the judiciary—should not be suppressed.

The imperative of judiciary integrity cannot justify exclusion. That doctrine, of dubious vitality, was created and developed in those decisions in which this Court exercised its supervisory power. That power, a nonconstitutional source of authority, cannot be exercised over the states. For that reason judicial integrity, spawned from and supported by this Court's inherent power over lower federal courts, cannot be imposed upon state tribunals. This court has not been granted supervisory authority over state courts. Even if it had such authority, judicial integrity would not compel suppression of reliable and probative evidence where, as here, the arrest and search were conducted pursuant to a statute that was valid at the time.

Evidence should not be suppressed to deter enactment of unconstitutional statutes. That purpose can be served less drastically and more effectively by the invalidation of the statute. Exclusion would be especially ineffective in this case because Nevada legislateors would not be deterred by the reversal of a California conviction. As there is no reason to exclude evidence, reliable and probative of guilt, it was properly admitted at trial.

Although the ordinance may have violated the Fifth Amendment, it did not offend the Fourth Amendment, which applies to searches, not to legislation. Since the search in this case was based upon probable cause, suppression of evidence could not further any value protected by the Fourth Amendment.



Alternatively, we contend that the Fourth Amendment claims of state prisoners should not be cognizable on federal habeas corpus. The benefit of deterring police misconduct is speculative. The cost—in terms of misallocation of resources, duplication of effort, friction between federal and state courts, deprivation of the states' interest in finality, and freeing guilty persons—is manifest and unacceptable. This conclusion is especially compelling in this case where the violation of the Fourth Amendment, if any, was merely "technical." Such violations, in contrast to those which demonstrate police brutality or bad faith, should not be considered on federal habeas corpus.

The vagrancy ordinance is not vague as applied to respondent.

Admission of evidence, if error, was harmless beyond a reasonable doubt.

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## ARGUMENT

### I

### THE ARREST OF RESPONDENT, MADE IN GOOD FAITH AND IN REASONABLE RELIANCE UPON A PRESUMPTIVELY VALID ORDINANCE, WAS LAWFUL AT THE TIME. THE ORDINANCE'S SUBSEQUENT INVALIDATION DOES NOT COMPEL APPLICATION OF THE EXCLUSIONARY RULE.

#### A. The Opinion Below.

In its opinion below, the court of appeal held that the vagrancy ordinance[1] of Henderson, Nevada, under which respondent was arrested, "'is void for vague-

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[1]That ordinance provides: "Every person is a vagrant who: Loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself

ness, both in the sense that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," [Citation.] and because it encourages arbitrary and erratic arrests and convictions. [Citations.]'" *Powell v. Stone,* 507 F.2d 93, 95 (1974), *quoting from Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972). The court decided that the ordinance violated respondent's right under the Fifth and Fourteenth Amendments to fair notice of the prohibited conduct. *See Parker v. Levy,* 417 U.S. 733, 752 (1974); *Smith v. Goguen,* 415 U.S. 566, 572 (1974); *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939). The ordinance also violated respondent's rights under those amendments to be free from arbitrary and discriminatory enforcement of vague statutes. *See Grayned v. City of Rockford,* 408 U.S. 104, 109 (1972); *Thornhill v. Alabama,* 310 U.S. 88, 97-98 (1940).

The court also found that the vagrancy ordinance violated respondent's rights under the Fourth and Fourteenth Amendments in two respects. First, it "authorizes arrest and conviction for conduct that is no more than suspicious. A legislature could not reduce the standard for arrest from probable cause to suspicion; and it may not accomplish the same result indirectly by making suspicious conduct a substantive offense." Second, the language of such ordinances "is so general and vague, the elements of the offense so obscure, that they afford no reasonable criteria by

and to account for his presence when asked by any peace officer to do so, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." 507 F.2d at 95.



which an officer may determine whether the ordinance has or has not been violated." 507 F.2d at 96; *accord Hall v. United States,* 459 F.2d 831, 836-37 (1972); *see also United States* ex rel. *Newsome v. Malcolm,* 492 F.2d 1166, 1172-74 (2d Cir. 1974), *aff'd sub nom. Lefkowitz v. Newsome,* 420 U.S. 283 (1975).

After holding that the arresting officer's good-faith reliance upon the presumptive validity of the ordinance did not render lawful the arrest of respondent (507 F.2d 97-98), the court then considered the question whether the unlawfulness of the arrest compelled the application of the exclusionary rule to the fruits of the arrest. The court held that exclusion was required for two reasons. First, the "public interest may dictate that the police not be deterred from enforcing statutory law even when it mandates unconstitutional conduct, but the public interest is served by deterring legislators from enacting such statutes." 507 F.2d at 98. Second, application of the exclusionary rule is mandated by the "imperative of judicial integrity." *Id.; Elkins v. United States,* 364 U.S. 206, 222 (1960).[2] Since the court of appeals, in "good conscience," could not find that the evidence seized was harmless beyond a reasonable doubt, it reversed the judgment of the district court denying the writ of habeas corpus. 507 F.2d at 99.

[2] *Contra, Hamrick v. Wainwright,* 465 F.2d 940, 941-42 (5th Cir. 1972) (dictum); *United States v. Dameron,* 460 F.2d 294, 95 (5th Cir.), *cert. denied,* 409 U.S. 882 (1972), *rev'd on other grounds,* 488 F.2d 724 (1974); *United States v. Kilgen,* 445 F.2d 287, 289 (1971); *People v. Carnesi,* 16 Cal. App.3d 863, 867-69, 94 Cal. Rptr. 555 (1971); *cf. Potts v. State,* 500 S.W.2d 523, 526 (Tex. Crim. App. 1973) (dictum); *State v. Harbaugh,* 132 Vt. 575, 326 A.2d 821, 825 (1974) (dictum).

For the reasons which follow, we submit that the ordinance did not violate the Fourth Amendment because *no* statute can violate that amendment.[3] The officer made the arrest with probable cause and in good faith, reasonably relying upon the validity of the ordinance. The determination by the court of appeals that the ordinance was "void for vagueness," a premise which we will not challenge in this Argument, does not compel exclusion of the evidence because no recognized purpose of the exclusionary rule would be served by exclusion.

**B. The Fourth Amendment Governs Searches, Not Legislation.**

The Fourth Amendment, made applicable to the States by force of the Due Process Clause of the Fourteenth Amendment (*Mapp v. Ohio,* 367 U.S. 643 [1961]; *Wolf v. Colorado,* 338 U.S. 25 [1949]), provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

The plain language of that amendment is aimed at, and is intended to guide, executive officers who conduct searches and seizures in the course of "the often

[3]This conclusion is not affected by a determination of the validity of the statute under the "fair notice" requirement of the Fifth and Fourteenth Amendments. Whether the ordinance gave respondent fair warning will be examined in Argument III.



competitive enterprise of ferreting out crime" (*Johnson v. United States,* 333 U.S. 10, 14 [1948]), and neutral and detached judicial officers (*Shadwick v. City of Tampa,* 407 U.S. 345 [1972]: *Coolidge v. New Hampshire,* 403 U.S. 443, 449-53 [1971]), who may issue warrants only upon a showing of probable cause. *United States v. Harris,* 403 U.S. 573 (1971); *Spinelli v. United States,* 393 U.S. 410 (1969); *Aguilar v. Texas,* 378 U.S. 108 (1964). The third branch of our tripartite system of government, the legislature, cannot violate the Fourth Amendment because it does not issue warrants or, more to the point, conduct searches.

The Fourth Amendment was adopted in response to the Colonial experience with arbitrary and unjustified searches pursuant to warrants issued without probable cause. *See Weeks v. United States,* 232 U.S. 383, 389-91 (1914); *Boyd v. United States,* 116 U.S. 616, 624-30 (1886). For that reason, the "overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California,* 384 U.S. 757, 767 (1966). "The security of one's privacy against arbitrary intrusion *by the police*" "is at the core of the Fourth Amendment" and "basic to a free society." *Wolf v. Colorado, supra,* 338 U.S. at 27 (emphasis added). Simply put, "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." *Katz v. United States,* 389 U.S. 347, 359 (1967). One respected commentator has postulated that "the regulation of police behavior is what the fourth amendment is all

about." Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349, 369 (1974).

We submit that both the language and purpose of the Fourth Amendment lead inevitably to the conclusion that it cannot be violated until a government official has conducted an unreasonable search. Enactment of a statute—or, indeed, issuance of a warrant upon less than probable cause—can *never* violate the amendment's commands. Only when the statute is enforced or a warrant is executed by a police officer do the provisions of the Fourth Amendment come into play. *See Sibron v. New York,* 392 U.S. 40, 61 (1968); Comment, N.Y.U.L. Rev. 595, 602 (1972).[4]

[4]The decisions of this Court cited by the court of appeals (507 F.2d at 97-98) do not refute this proposition. In *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973), this Court held unconstitutional the search of the defendant's car because it was conducted without probable cause (*Chambers v. Maroney,* 399 U.S. 42, 47-49 [1970]; *Carroll v. United States,* 267 U.S. 132, 153 [1925]), and was not a border search within the meaning of the statute (8 U.S.C. § 1557(a)), upon which the Government relied. The search, not the statute, was unconstitutional. In *Coolidge v. New Hampshire, supra,* 403 U.S. 443, the search of Coolidge's automobile violated the Fourth Amendment because, *inter alia,* the search warrant which the police officers had obtained was issued by the attorney general pursuant to statutory authorization. This Court held that invalidated the search warrant, and therefore the search, because it was not issued by the "neutral and detached magistrate" required by the Fourth Amendment. *E.g., Johnson v. United States, supra,* 333 U.S. at 13-14. "We find no escape from the conclusion that the *seizure and search* of the Pontiac automobile cannot constitutionally rest upon the warrant of the state official who was the chief investigator and prosecutor in this case." 403 U.S. at 453 (emphasis added).

In *Sibron v. New York, supra,* 392 U.S. at 62, this Court concluded that its "constitutional inquiry would not be furthered here by an attempt to pronounce judgment on the words of the statute. We must confine our review instead to the reasonableness of the searches and seizures which underlie [the] convictions."

*Berger v. New York,* 388 U.S. 41 (1967), is difficult to analyze in terms of its precedential value on this issue. The prevailing opinion apparently declares that the New York eavesdrop statute, "as it is written," "permits a trespassory invasion of the home or office by general warrant, contrary to the command of the Fourth Amendment." *Id.* at 64. To the extent that the warrant before this Court failed to meet the standards of the Fourth Amendment (*id.* at 54-60), the invalidation of the search was required, for a state law cannot authorize an unconstitutional search. *Cf. Almeida-Sanchez v. United States, supra,* 413 U.S. at 272. To the extent that the opinion states that no future search warrant issued pursuant to the terms of the statute can be constitutional if it does not also square with the Fourth Amendment, the decision is justifiable. However, the failure of this Court to discuss the search before it is both puzzling and unjustifiable.

The problem becomes even more complicated in view of the five concurring and dissenting opinions. Justice Douglas apparently believed that *no* eavesdrop could ever be constitutional. 388 U.S. at 64. Justice Stewart concurred in the judgment, stating that the affidavits did not provide probable cause to justify the issuance of the warrant. *Id.* at 69. Justices Black, Harlan, and White took a contrary view, finding that this search complied with the Fourth Amendment. *Id.* at 83-87, 101, 108-12. Thus, four justices considered the facts of the case; four justices examined only the statute; one justice did neither, stating that no eavesdrop could be constitutional. We therefore respectfully question the force of *Berger v. New York* as binding precedent on the issue of whether a statute can violate the Fourth Amendment. *Cf. Ohio v. Price,* 364 U.S. 263, 264 (1960).



With this elementary yet crucial concept in mind, we examine the holding of the court of appeals that the vagrancy ordinance violated the Fourth Amendment. As stated previously, the court declared that the ordinance was void under that amendment for two reasons. First, it permitted arrest and conviction for conduct which was merely suspicious; second, its standards were so vague that no reasonable officer could have probable cause to believe that it may have been violated. We submit that the first reason confuses the interests protected by the Fourth Amendment with those guarded by the Due Process Clause of the Fifth and Fourteenth Amendments. The court's second reason is unsupportable in view of the lan-

guage of the ordinance and the finding of the district court and, indeed, is contradicted by a portion of the court's own opinion.

Starting with the obvious proposition that a "legislature could not reduce the standard for arrest from probable cause to suspicion," the court reasoned that the ordinance accomplished that result indirectly by "authorizing arrest *and conviction* for the vagrancy offense if there are reasonable grounds to suspect that the accused may have committed" a substantive offense. 507 F.2d at 96 (emphasis added). The court's conclusion must be rejected for two interrelated reasons. First, it is true that a legislature may not make suspicious conduct a crime, but enactment of such measures is forbidden by the Due Process Clause of the *Fifth Amendment. See Papachristou v. City of Jacksonville, supra,* 405 U.S. at 163-68;[5] *Hall v. United States, supra,* 459 F.2d at 844 (dissenting opinion); Note, 18 Vill. L. Rev. 117, 123 (1972). The court's reference to "convictions" buttresses the conclusion that it was actually invoking Fifth Amendment principles. The Fourth Amendment—governing searches, not legislation or convictions—is simply irrelevant to the court's analysis.

[5]Although *Papachristou* alludes to Fourth Amendment considerations (405 U.S. at 169), it is clear that the opinion rests solidly upon the due process prohibition against impermissibly vague statutes. The point of its reference to the Fourth Amendment is that vague vagrancy statutes permit pretextual arrests of those who are suspected of committing other, more serious crimes. As there is no evidence in this case that the arrest was pretextual (see Part D of this Argument), that aspect of the *Papachristou* decision is not relevant herein.



Second, the court was proceeding from the implicit premise that probable cause has a viability independent of the statute under which the arrest is made. According to the court, the elements of a penal statute are irrelevant to the existence of probable cause, which therefore is an invariable. But that cannot be so, because probable cause for murder is different from probable cause for robbery, arson, or theft. Probable cause may be determined only by reference to the statute in question, and it is possible that probable cause—a Fourth Amendment concept—may exist under a statute which makes criminal otherwise innocent activity—a Fifth Amendment question. "If probable cause may be described as a reasonable belief that the arrestee is guilty of an offense, such a principle can only have meaning if it is considered in conjunction with the statute describing the offense. Thus, Fourth Amendment requirements would be satisfied if the statute describes suspicious conduct as a crime in such a way as to allow the man of reasonable caution to form a reasonable belief that the arrestee's conduct violates the statute." Note, 18 Vill. L. Rev., *supra,* at 123 (fn. omitted).

To reiterate, the court of appeal misconceived probable cause, treating it as an abstract entity which could not be altered by a substantive criminal statute. In fact, probable cause in any given context derives its content from the elements of the statute. If those elements do not give sufficient notice of what conduct is proscribed, the statute violates the Fifth Amendment, but it does not follow that the officer's conduct has offended the Fourth Amendment. The

lower court's confusion about the interests protected by the respective amendments resulted in its mistaken reliance upon the Fourth Amendment.

The court also declared that the standards of the ordinance were so vague that under no circumstances could it provide criteria to permit a reasonable man to believe that it may have been violated. We may assume, without conceding, that a statute may be so imprecise that every arrest which it purports to authorize would be unreasonable because there would exist no standards against which to measure the conduct of the arrestee. *Id.* In short, the standards would not merely be vague; they would be nonexistent. *Cf. Coates v. City of Cincinnati,* 402 U.S. 611, 614 (1971).

Yet the court of appeals was able to identify three criteria which were provided in the ordinance. 507 F.2d at 95-96; *cf. Palmer v. City of Euclid,* 402 U.S. 544 (1971). Such identification was inconsistent with its decision that the ordinance violated the Fourth Amendment. Furthermore, the district court found that respondent's conduct had satisfied these criteria, thereby giving rise to probable cause. The findings of the district court are, of course, entitled to great weight. *See Ker v. California,* 374 U.S. 23, 32 (1963); *Mapp v. Ohio, supra,* 367 U.S. at 653; *United States v. Rabinowitz,* 339 U.S. 56, 63 (1950), *overruled on other grounds in Chimel v. California,* 395 U.S. 752 (1969); *cf.* 28 U.S.C. 2254(d). We therefore submit, and the lower courts have concluded, that the vagrancy ordinance is not so lacking in standards that all arrests pursuant to its enforcement are unreasonable. Rather, the search of respondent—the only search



before this Court[6]—was justified by probable cause to believe that his conduct had satisfied the criteria of the ordinance.

### C. There Can Be Probable Cause To Believe That A Vague Statute Has Been Violated.

The foregoing discussion has implicitly assumed that a reasonable man may reasonably believe that a statute, subsequently declared vague, has been violated. Although that assumption contains a superficial inconsistency, analysis should resolve the paradox. A statute which is impermissibly vague under the Due Process Clause of the Fifth Amendment not only fails to give fair notice but lacks reasonably clear guidelines for triers of fact to apply to evidence adduced at trial. *See Smith v. Goguen, supra,* 415 U.S. at 573. It is conceptually impossible for a lay jury to find *beyond a reasonable doubt* that the imprecise elements of a statute have been violated. *See In re Winship,* 397 U.S. 358 (1970). However, evidence falling far short of the quantum necessary to convict can establish probable cause under the Fourth Amendment. Each element of the crime need not be established to permit a lawful arrest. *United States v. Ventresca,* 380 U.S. 102, 107 (1965).

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[6]The vagueness of the ordinance may result in invalid arrests of other persons. Indeed, any arrest without probable cause, even under a valid statute, violates the Fourth Amendment. But respondent cannot complain of the arrests of others (*cf. Wong Sun v. United States,* 371 U.S. 471, 491-92 [1963]), or of the application of a statute which may be vague only as to others. *See Parker v. Levy, supra,* 417 U.S. at 755-57; *Smith v. Goguen, supra,* 415 U.S. at 577-78 (dictum); Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. Pa. L. Rev. 67, 96-104 (1960).

Vagueness and probable cause are determined by the criteria and values of two different amendments. As a result, a "law may be so ill-defined as to leave the reasonable citizen guessing as to the conduct prohibited, yet sufficiently clear to enable a policeman with his increased legal sophistication to determine the scope of the law and the existence of probable cause." Comment, 47 N.Y.U.L. Rev., *supra,* at 601. "The subsequent determination that the statute under which the arrest was made was too imprecise to authorize conviction would seem irrelevant to a consideration of the legality of the arrest; that is, to hold an arrest illegal because made under a statute subsequently voided under the Fifth Amendment is, at best, a proposition of doubtful validity." Note, 18 Vill. L. Rev., *supra,* at 121.

This case presents a classic situation of obvious probable cause under an invalid statute. The facts and circumstances resulting in respondent's arrest have been stated in the Statement of Facts and in the order of the district court. (App. B to Petition for Writ of Certiorari at xviii-xix). Respondent was wandering aimlessly near the shopping center of Henderson, Nevada, early on a Sunday morning. Seeing Officer Lattin's marked police car, he walked away rapidly and did not stop when the officer directed him to halt. Although he gave his name and date of birth, he produced no identification to verify his representations, stating that it had been stolen. He could not or would not tell Officer Lattin how long or with whom he had been in Las Vegas; his explanation



about his ultimate destination was physically improbable. It was reasonable for Officer Lattin to believe that respondent had violated the ordinance:[7] he was wandering the streets, could not account for his presence in Henderson, and had no identification. The District Court found that there was probable cause to arrest. The search incidental to that arrest was proper. *Gustafson v. Florida,* 414 U.S. 260 (1973); *United States v. Robinson,* 414 U.S. 218 (1973); *Chimel v. California,* 395 U.S. 752 (1969).

**D. The Arrest Was Not A Pretext To Search.**

We recognize that vagrancy laws have often been enacted to permit arrests and searches of those suspected of more serious crimes for which probable cause to arrest is lacking. *See Papachristou v. City of Jacksonville, supra,* 405 U.S. at 169; *United States* ex rel. *Newsome v. Malcolm, supra,* 492 F.2d at 1172; *Hall v. United States, supra,* 459 F.2d at 838; Douglas, *Vagrancy and Arrest on Suspicion,* 70 Yale L.J. 1, 11-13 (1960); Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality,* 37 N.Y.U.L. Rev. 102, 129-30 (1962); Note, 47 N.Y. U.L. Rev., *supra,* at 595; Comment, 18 Vill. L. Rev., *supra,* at 118; *cf. Lewis v. City of New Orleans,* 415 U.S. 130, 136 (1974) (Powell, J., concurring). We further recognize that an arrest cannot be used as a pretext for a search. *United States v. Lefkowitz,* 285 U.S. 452, 467 (1932). Without pausing to consider whether all pretextual arrests based upon probable

[7] *See* n. 1, *supra.*

cause are invalid,[8] we submit that the record is devoid of any evidence that *this* arrest was a pretext for a search. Officer Lattin had no reason to suspect, and did not suspect, that respondent had committed a crime other than violating the vagrancy ordinance. Indeed, he was not aware of the shooting in San Bernardino on the previous evening. 507 F.2d at 95 n.2. Neither the court of appeals nor the district court found that the officer arrested respondent for any reason other than the stated basis. Whatever the motive of the City of Henderson in enacting the ordinance—and whatever the reasons that other officers may have for making other arrests under the ordinance—*this* arrest was not a pretext for a search. There can be no question about the good faith of the officer.

**E. No Recognized Purpose of the Exclusionary Rule Would Be Served By Exclusion of the Evidence.**

It appears from the foregoing that the arrest of respondent was made with probable cause and in good faith. Since the court of appeals declared unconstitutional the ordinance under which respondent was arrested, we are confronted with a legal anomaly: an arrest which is reasonable but unlawful, because not authorized by a valid state law. But "a search not expressly authorized by state law [may] be justified as a constitutionally reasonable one." *Cooper v. California,* 386 U.S. 58, 61 (1967). We must now inquire whether the *post hoc* condemnation of a presumptively valid and lawfully enacted ordinance compels the application of the exclusionary rule to the weapon found on respondent.

[8]Pretextual arrests of a person were often made in his home to permit a search of the entire premises. *Cf. United States v. Rabinowitz, supra,* 339 U.S. 56; *Harris v. United States,* 331 U.S. 145 (1947). In view of the overruling of *Rabinowitz* and *Harris* by *Chimel v. California, supra,* 395 U.S. at 768, the scope of the pretext doctrine is uncertain at best. *But see United States v. Robinson, supra,* 414 U.S. at 238 n.2 (Powell, J., concurring).



Prior to the decision of the court of appeals, the exclusionary rule had been justified on three grounds. *See* Note, *The Fourth Amendment Exclusionary Rule: Past, Present, No Future,* 12 Amer. Crim. L. Rev. 507, 508-12 (1975). First, to vindicate his right to privacy, the accused had a personal constitutional right to exclude evidence obtained as a result of unlawful searches and seizures directed against him. *See Mapp v. Ohio, supra,* 367 U.S. at 655-56; *Weeks v. United States, supra,* 232 U.S. at 392-94; Schrock and Welsh, *Up from* Calandra: *The Exclusionary Rule as a Constitutional Requirement,* 59 Minn. L. Rev. 251 (1974).

Second, exclusion of unlawfully seized evidence is necessary to deter police misconduct. *Brown v. Illinois,* 43 U.S.L.W. 4937, 4940 (1975); *United States v. Peltier,* 43 U.S.L.W. 4918, 4922 (1975); *Michigan v. Tucker,* 417 U.S. 433, 446 (1974); *United States v. Calandra,* 414 U.S. 338, 347 (1974); *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 413-15 (1971) (Burger, C. J., dissenting); *Kaufman v. United States,* 394 U.S. 217, 238 (1969) (Black, J., dissenting); *Desist v. United States,* 394 U.S. 244, 249-50, 251 (1969); *Linkletter v. Walker,* 381 U.S. 618, 636-37 (1965); *Mapp v. Ohio, supra,* 367 U.S. at 656; *Elkins v. United States, supra,* 364 U.S. at 217;

*People v. Cahan,* 44 Cal.2d 434, 448, 282 P.2d 905 (1955); Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. Chi. L. Rev. 665, 668-71 (1970) [hereinafter cited as Oaks].

Third, exclusion of unlawfully seized evidence has been deemed necessary to preserve the judicial integrity of the court before which the defendant is being tried. *E.g., Lee v. Florida,* 392 U.S. 378, 385 (1968); *Terry v. Ohio,* 392 U.S. 1, 12 (1968); *Elkins v. United States, supra,* 364 U.S. at 222; *Olmstead v. United States,* 277 U.S. 438, 470, 484-85 (1928) (Holmes and Brandeis, J. J., dissenting); *see generally* Note, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule,* 20 U.C.L.A. L. Rev. 1129 (1973).

This Court has repudiated the personal right theory. "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim: '[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late'. *Linkletter v. Walker,* 381 U.S. 618, 637 (1965)." *United States v. Calandra, supra,* 414 U.S. at 347; *accord, United States v. Peltier, supra,* 43 U.S.L.W. at 4921. It remains to be considered whether the purposes of deterrence or judicial integrity would be served by the exclusion of evidence in this case.

Before applying the exclusionary rule, a remedial device not expressly mentioned in the Fourth Amendment, this Court—or any court—must balance its costs against its benefits. *See United States v. Calandra, supra,* 414 U.S. at 348-51; Kaplan, *The Limits of The*



*Exclusionary Rule,* 26 Stan. L. Rev. 1027, 1032-35 (1974). Typically, the competing interests are the value to society of deterring future police misconduct and the cost of freeing without punishment a defendant whose guilt is proven by the suppressed evidence. Note, 20 U.C.L.A. L. Rev., *supra,* at 1149. When the cost is greater than the benefit, the evidence is not excluded. *United States v. Calandra, supra.* It is therefore necessary to assess the deterrent effect of the exclusion of the evidence in this case. "Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose." *Michigan v. Tucker, supra,* 417 U.S. at 446.

"The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. . . . Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Id.* at 447; *accord, Brown v. Illinois, supra,* 43 U.S.L.W. at 4944 (Powell, J., concurring); *United States v. Peltier, supra,* 43 U.S.L.W. at 4921.

We submit that *United States v. Peltier, supra,* provides compelling authority for the proposition that the deterrence rationale could not possibly be served in this case. In *Peltier,* Government agents had conducted a species of search subsequently condemned by this Court in *Almeida-Sanchez v. United States, supra,* 413 U.S. 266. The question for decision was whether the ruling in *Almeida-Sanchez* should apply to searches conducted before the decision in that case.

Holding that no useful purpose could be served by a retroactive application of *Almeida-Sanchez,* this Court made the following observations which are virtually controlling in the case at hand:

> "It was *in reliance upon a validly enacted statute,* supported by longstanding administrative regulations and continuous judicial approval, that border patrol agents stopped and searched respondent's automobile. Since the parties acknowledge that *Almeida-Sanchez* was the first roving border patrol case to be decided by this Court, *unless we are to hold that parties may not reasonably rely upon any legal pronouncement emanating from sources other than this Court, we cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm.* [Citations omitted.] *If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge,* or may properly be charged with knowledge, *that the search was unconstitutional under the Fourth Amendment.* Admittedly this uniform treatment of roving border patrol searches by the federal judiciary was overturned by this Court's decision in *Almeida-Sanchez.* But in light of this history and of what we perceive to be the purpose of the exclusionary rule, we conclude that nothing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it, requires that the evidence here be suppressed, even if we assume that respondent's Fourth Amendment rights were violated by the search of his car." 43 U.S.L.W. at 4922 (emphasis added; fns. omitted).



It is true that the Henderson vagrancy ordinance had never been approved judicially, as had the statute in *Peltier,* but neither had it been condemned until December 4, 1974, almost seven years after the arrest of respondent. Officer Lattin's reasonable and good-faith reliance upon the validity of the ordinance totally undermines any attempt to rationalize the suppression of evidence on the grounds of deterrence. "Police conduct authorized by a statute which may be unconstitutional, will not be deterred . . . because the police cannot foresee which of the statutes that govern their conduct will be invalidated in the future." Note, 47 N.Y.U.L. Rev., *supra,* at 604. Therefore, deterrence of future unlawful police conduct, the exclusionary rule's "prime purpose" (*United States v. Calandra, supra,* 414 U.S. at 347), will not be served by suppression in this case.[9]

Ideally, police should be encouraged to rely on the coordinate branches of government whenever possible while "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States, supra,* 333 U.S. at 14. Typically, police are asked to rely upon the assessment of the judiciary in determining

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[9]Justice Powell has described an arrest under a statute subsequently declared unconstitutional as a mere "technical" violation of the Fourth Amendment. In such a situation, "the deterrence rationale of the exclusionary rule does not obtain, and I can see no legitimate justification for depriving the prosecution of reliable and probative evidence." *Brown v. Illinois, supra,* 43 U.S.L.W. at 4944 (concurring opinion). Just as an officer who has made a reasonable mistake of fact should not be penalized by the application of the exclusionary rule (*Hill v. California,* 401 U.S. 797, 804 [1971]), the same conclusion should obtain when a policeman has reasonably—but mistakenly—assumed the validity of the law under which he has made an arrest.

whether probable cause exists to conduct a search. *E.g., United States v. Ventresca, supra,* 380 U.S. 102. In this case, the officer relied upon the presumptive validity of the legislative determination that the facts which he perceived amounted to an offense against society. Suppression of evidence seized under authority of a warrant later invalidated will not deter police misconduct (*cf. Brown v. Illinois, supra,* 43 U.S.L.W. at 4944 [Powell, J., concurring]); the same must be said of arrests under statutes later held unconstitutional, and for the same reason. The officer's reasonable reliance upon another branch of the government is not misconduct. Indeed, to the extent that suppression discourages such reliance, the exclusionary rule has a negative impact upon law enforcement and civil liberties.

But the court of appeals relied upon two other rationales, one of which has been recognized by this Court: the "imperative of judicial integrity." Many things may be said about this nebulous concept, few of them favorable. It is inconsistent with the other Fourth Amendment precedents of this Court in at least seven respects. First, the requirement that the defendant have "standing" to object to the search (*e.g., Alderman v. United States,* 394 U.S. 165, 173-76 [1969]; *Jones v. United States,* 362 U.S. 257, 261 [1960]), permits illegally seized evidence to be admitted against a defendant who does not satisfy the requirement. The result in that the court admitting the evidence has "dirtied its hands" and thereby sullied its integrity. *See* Note, 12 Amer. Crim. L. Rev.,



*supra,* at 514. Second, a defendant illegally arrested —even kidnaped—may be validly convicted despite the unlawful nature of his seizure. *Gerstein v. Pugh,* 420 U.S. 103, 119 (1975); *Frisbie v. Collins,* 342 U.S. 519 (1952); Oaks, *supra,* at 669.

Third, evidence seized unlawfully by private citizens is admissible in a criminal trial. *Burdeau v. McDowell,* 256 U.S. 465 (1921). Fourth, illegally obtained evidence may be used to impeach a witness, including the defendant. *Walder v. United States,* 347 U.S. 62 (1954); *cf. Harris v. New York,* 401 U.S. 222 (1971). Fifth and sixth, both the doctrines of "attenuation" (*Wong Sun v. United States,* 371 U.S.471, 487-88 [1963]) and harmless error (*Chapman v. California,* 386 U.S. 18 [1967]) are applicable to illegally seized evidence. Thus, a court may permit its integrity to be compromised as long as it does not prejudice the defendant, thus confusing his rights with its obligations. *See* Kaplan, 26 Stan. L. Rev., *supra,* at 1030. Finally, this Court's decision to hold prospective in application *Mapp v. Ohio, supra,* (*Linkletter v. Walker, supra,* 381 U.S. 618) "in effect, ratified police violations of the Fourth Amendment occurring after that amendment was made applicable to the states through the Fourteenth Amendment [in *Wolf v. Colorado*]." Note, 12 Amer. Crim. L. Rev., *supra,* at 514.

Not only have the exceptions undermined the rule, the concept itself, which has never been invoked by this Court as the sole justification to suppress evidence (Oaks, *supra,* at 669), rests upon a questionable view of the judicial process and its responsibility to

society. "The weakness of the judicial integrity argument is that it asks us to be guided by what seems like judicial squeamishness; or, failing that, it asks us to engage in speculation about the remote consequences of judicial complicity in lawless governmental action." Schrock and Welsh, 59 Minn. L. Rev., *supra,* at 265. Viewed as an end in itself, judicial integrity permits a court to protect its purity by suppressing truth and permitting a guilty defendant to go free. "Is not the court which excludes evidence in order to avoid condoning the acts of the officer by the same token condoning the illegal acts of the defendant?" Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan,* 43 Calif. L. Rev. 565, 582 (1955).

If suppression of illegally seized evidence is seen as a method of teaching by example (*Olmstead v. United States, supra,* 277 U.S. at 485 [Brandeis, J., dissenting]) or of "minimizing the risk of seriously undermining popular trust in government" (*United States v. Calandra, supra,* 414 U.S. at 357 [Brennan, J., dissenting]), then the justification for judicial integrity is speculative. "If proponents of the exclusionary rule say judicial lawlessness is a societal menace, the rejoinder is, why not risk that menace rather than the far worse danger of lawlessness in the streets?" Schrock and Welsh, 59 Minn. L. Rev., *supra,* at 266.

A more fundamental objection to the doctrine than its dubious premises is its questionable legal foundation. We have searched the Constitution in vain for the provision which entitles this Court to instruct all



other tribunals to defend their integrity by excluding relevant evidence. Of course this Court has inherent supervisory power to direct lower federal courts to abstain from participating in the "dirty business" of police misconduct. *Cf. McNabb v. United States,* 318 U.S. 332 (1943); *see generally* Hill, *The Bill of Rights and The Supervisory Power,* 69 Colum. L. Rev. 181, 193-99 (1969). Indeed, in *McNabb,* one of the earliest cases to invoke the supervisory power, this Court stated that "a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand *without making the courts themselves accomplices in willful disobedience.*" 318 U.S. at 345 (emphasis added). It is significant that the italicized language, having the ring associated with the invocation of the doctrine of judicial integrity, is found in a decision which is so closely identified with the concept of supervisory power.

Justice Brandeis's dissent in *Olmstead* provides further support for the position that judicial integrity has its origin in this Court's supervisory power. After arguing eloquently that the conduct at bench was a search in the constitutional sense (277 U.S. at 471-79), he then declared: "*Independently of the constitutional question,* I am of opinion that the judgment should be reversed." *Id.* at 480 (emphasis added). What followed was his classic discourse about the duty of the courts to protect their integrity and promote confidence in the administration of justice by rejecting evidence seized in violation of state law. *Id.* at 480-85.

It is clear that Justice Brandeis implicitly believed that federal courts had the inherent power, independent of the Constitution, to protect themselves from tainted evidence. *See* Note, *The Supervisory Power of the Federal Courts,* 76 Harv. L. Rev. 1656, 1663 (1963). Finally, it is worthy of note that the phrase, "the imperative of judicial integrity," was coined in a decision which rested on this Court's supervisory power. *Elkins v. United States, supra,* 364 U.S. at 216, 222.

We therefore suggest that this Court may invoke its supervisory power to cleanse the hands of federal courts. But since it has no supervisory power over state courts (*Ker v. California, supra,* 374 U.S. at 31; *Mapp v. Ohio, supra,* 367 U.S. at 678 [Harlan, J. dissenting]), we respectfully submit that this Court has not the power to instruct those tribunals to protect their integrity. The doctrine of judicial integrity can have no relevance to a consideration of the legality of a search whose fruits are admitted in state courts.

Even conceding the applicability of the doctrine to state cases, we question the extent of its present vitality. The dissenters in *Calandra* feared that "the Court today discounts to the point of extinction the vital function of the rule that the judiciary avoid even the silghtest appearance of sanctioning illegal government conduct." 414 U.S. at 360. The majority's implicit premise that deterrence and judicial integrity are inextricably intertwined (*id.* at 356 n. 11) was expressly stated in *Michigan v. Tucker, supra,* 417 U.S. at 450 n. 25: "This rationale [of judicial integrity],



however, is really an assimilation of the more specific rationales discussed in the text of this opinion, and does not in their absence provide an independent basis for excluding challenged evidence." Thus, judicial integrity has been subsumed in the more plausible rationale of deterrence. Despite references to judicial integrity by the majority in *Peltier* (43 U.S.L.W. at 4920-21) and the hopeful endorsement by the dissenters (*id.* at 4925 n. 13), it should now be clear that *"the purpose* of the exclusionary rule is to deter unlawful police conduct . . . ." *Id.* at 4922 (emphasis added).

To the extent that the imperative of judicial integrity is viable at all, *Peltier* makes it clear that it does not compel suppression of evidence in this case. That rationale "is also not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search and seizure have held that the conduct of the type engaged in by law enforcement officials is not permitted by the Constitution." *Id.* at 4920. Given the good-faith and reasonable reliance by Officer Lattin upon the presumptive validity of the vagrancy ordinance, it is manifest that judicial integrity was not offended by the admission of the fruits of the search into evidence at trial.

**F. The Exclusionary Rule Should Not Be Employed To Deter Legislatures From Enacting Unconstitutional Statutes.**

The court of appeals rested its decision not only upon the imperative of judicial integrity but upon the need to deter legislatures from enacting unconsti-

tutional statutes. 507 F.2d at 98; *accord, Comment,* 47 N.Y.U.L. Rev., *supra,* at 602. This rationale must fail for the following reasons. First, it is totally without support from the decisions of this Court, discussed in Part E of this Argument. Second, the exclusionary rule was fashioned to effectuate the provisions of the Fourth Amendment, which is aimed at police misconduct, not legislative misjudgment (See Part B). Finally, it is important to recognize that this Court decided *Mapp* only after other means of enforcing the Fourth Amendment had proved futile. 367 U.S. at 651-52; *accord, People v. Cahan, supra,* 44 Cal.2d at 445; *compare Wolf v. Colorado, supra,* 338 U.S. at 31, *with id.* at 41-46 (Murphy, J., dissenting).

By contrast, legislatures may be "deterred" from enacting invalid measures simply by attacking their constitutionality. A person convicted under an unconstitutional criminal statute may attack his conviction and the statute in state appellate courts and by appeal to this Court. 28 U.S.C. § 1257(2). He may then attack his conviction in federal court by means of a petition for writ of habeas corpus. *Id.* § 2254(a). Furthermore, any person even threatened with prosecution under a statute whose validity is in dispute may seek declaratory relief in federal court.[10] ***E.g.,*** *Steffel v. Thompson,* 415 U.S. 452 (1974).

It is therefore unnecessary to utilize the drastic remedial device of the exclusionary rule when there

[10]In Nevada, it is possible to seek a declaratory judgment regarding the validity of a municipal ordinance. Nev. Rev. Stats. 30.040 (1973).



are numerous and equally effective alternatives. Furthermore, and wholly aside from the dubious proposition that there is a rational relationship between exclusion of reliable evidence from a prosecution under a valid statute and deterrence of an occasional enactment of an invalid measure, we contend exclusion could not have any deterrent impact on the governing body of Henderson, Nevada. Respondent was tried and convicted in California for violation of a California law; the reversal of his conviction and possible release would be of no concern to Nevada legislators. The opinion of the court of appeals, holding to the contrary, is unsupportable.

### G. Suppression of Evidence Is Not Compelled By the Case-or-Controversy Requirement.

It may be argued that the reasonable and good-faith reliance upon a presumptively valid statute should preclude suppression of evidence discovered during the course of other arrests made under the ordinance prior to December 4, 1974, but that respondent should receive the benefit of his own decision. We recognize that this Court can only decide concrete cases or controversies (U.S. Const. Art. III, § 2; *Stovall v. Denno,* 388 U.S. 293, 401 [1967]) and cannot issue advisory opinions. *See, e.g., Muskrat v. United States,* 219 U.S. 346 (1911). However, this rule does not compel suppression of evidence.

Four distinct questions were decided by the court of appeals: (1) Was the ordinance constitutional? (2) Were the arrest and search unlawful? (3) Did the illegality of the arrest and search demand the

activation of the exclusionary rule? (4) If admission of the evidence was error, was it harmless? If the court had declared the ordinance to be unconstitutional but had failed to discuss the relevance of that declaration to respondent's rights, the opinion would have been advisory and in violation of the Constitution. Once the court had held that the arrest and search of *respondent* were unlawful because of the invalidity of the ordinance, it had then satisfied the case-or-controversy requirement.

The decision that the arrest was unlawful, of course, does not invariably lead to the conclusion that evidence must be suppressed. *Cf. United States v. Calandra, supra.* The third issue may be resolved in one of two ways: The evidence should have been suppressed, as the court of appeals held; or it was properly admitted, as we have contended. Either resolution is permissible in the context of the case-or-controversy requirement because either has a direct bearing upon the ultimate issue of the relief to which respondent is entitled. If the evidence was properly admitted, the writ of habeas corpus was properly denied. If the evidence should have been excluded and was prejudicial (see Argument IV), the writ should have been granted.

We therefore submit that, consistent with the case-or-controversy requirement, this Court may properly hold that the search of respondent was unlawful but that the illegality did not require exclusion of the evidence. The writ therefore was properly denied.

It is true that there was reliance upon the statutes at issue in *Almeida-Sanchez v. United States, supra;*



*Coolidge v. New Hampshire, supra;* and *Berger v. New York, supra,* but that in each case the defendant's conviction was reversed. However, there is no indication in those opinions that the respective respondents urged this Court to affirm the judgments because of the good-faith reliance upon the statutes by the officers. *Cf. United States v. Peltier, supra,* 43 U.S.L.W. at 4922 n. 12 (no "considerations of exclusionary rule policy independent of the merits of the Fourth Amendment question" urged). The respondents in those cases must have assumed that violation of the Fourth Amendment, even if reasonable and in good faith, required suppression of the evidence. We have questioned that assumption and have argued that it is invalid in this case. The evidence, seized in reliance upon the decision—in the form of an ordinance—of a coordinate branch of the government, was properly admitted.

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## II

### FEDERAL HABEAS CORPUS SHOULD NOT BE AVAILABLE TO RELITIGATE THE VALIDITY OF A FOURTH AMENDMENT CLAIM MADE BY A STATE PRISONER.

#### A. Kaufman v. United States Should Be Overruled.

This Court has stated expressly (*Kaufman v. United States,* 394 U.S. 217, 225-27 [1969]), and held implicitly (*e.g., Whiteley v. Warden,* 401 U.S. 560 [1971]); *Harris v. Nelson,* 394 U.S. 286 [1969]; *Mancusi v. DeForte,* 392 U.S. 364 [1968]; *Carafas v. LaVallee,* 391 U.S. 234 [1968]; *Warden v. Hayden,* 387 U.S. 294 [1967]), that a Fourth Amendment claim by

a state prisoner is cognizable on federal habeas corpus. It is now time to reconsider and overrule those decisions.

It is not the purpose of this Argument to review the debate over the history, purpose, and scope of federal habeas corpus. Elaborate and scholarly discussions can be found elsewhere. *Compare Fay v. Noia,* 372 U.S. 391, 399-426 (1963), *with id.* at 449-63 (Harlan, J., dissenting); *compare Developments in The Law—Federal Habeas Corpus,* 83 Harv.L.Rev. 1038, 1042-62, 1263-74 (1970), *and* Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding,* 74 Harv.L.Rev. 1315, 1324-1332 (1961), *with* Oaks, *Legal History in the High Court—Habeas Corpus,* 64 Mich. L.Rev. 451, 451-68 (1966), *and* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv.L.Rev. 441, 463-507 (1963) [hereinafter cited as Bator]. "The scope of federal habeas corpus for state prisoners has evolved from a quite limited inquiry into whether the committing state court had jurisdiction, [Citations omitted.], to whether the applicant had been given an adequate opportunity in state court to raise his constitutional claims, [Citation omitted.]; and finally to actual redetermination in federal court of state court rulings on a wide variety of constitutional contentions . . . ." *Schneckloth v. Bustamonte,* 412 U.S. 218, 255-56 (1973) (Powell, J., concurring). Rather, the focus of the present inquiry is whether the benefits to society and the prisoner in permitting Fourth Amendment claims to be raised on federal habeas corpus justify the resulting costs.



"The provision of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief." *Kaufman v. United States, supra,* 394 U.S. at 226. Without questioning the wisdom of this stated purpose of the writ (*see* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U.Chi.L.Rev. 142, 162 [1970] [hereinafter cited as Friendly]), we contend that it is inapplicable to claims that the state courts erred in failing to suppress evidence. The purpose of the writ is to determine whether the violation of personal constitutional rights resulted in the deprivation of liberty. *See Fay v. Noia, supra,* 372 U.S. at 405, 409, 424. "Vindication of due process is precisely its historic office." *Id.* at 402. But a defendant has no personal right to the suppression of evidence; that is a societal right. *United States v. Calandra, supra,* 414 U.S. at 347; *Linkletter v. Walker, supra,* 381 U.S. at 637. Thus, a federal court can order that unlawfully seized evidence be suppressed only if society has an interest in suppression.

The cost to society of relitigation of constitutional claims on federal habeas corpus is obvious. The disposition of habeas petitions taxes judicial resources (*Schneckloth v. Bustamonte, supra,* 412 U.S. at 259-61; Friendly, *supra,* at 148), and causes friction between federal courts and the state judiciaries whose decisions are second-guessed. *Schneckloth v. Bustamonte, supra,* at 263-65; Bator, *supra,* at 451; *contra,*

Note, *Federal Habeas Corpus for State Prisoners and the Fourth Amendment,* 52 N.Car.L.Rev. 633, 641-42 (1974). Unlimited availability of habeas corpus undermines the deterrent and rehabilitative functions of the criminal law:

> "The first step in achieving [those aims] may be a realization by the convict that he is justly subject to sanction, that he stands in need of rehabilitation; and a process of reeducation cannot, perhaps, even begin if we make sure that the cardinal moral predicate is missing, if society itself continuously tells the convict that he may not be justly subject to reeducation and treatment in the first place. The idea of just condemnation lies at the heart of the criminal law, and we should not lightly create processes which implicitly belie its possibility." Bator, *supra,* at 452; *accord, Schneckloth v. Bustamonte, supra,* at 262; *Sanders v. United States,* 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting); Friendly, *supra,* at 146.

The endless possibility of federal collateral relief tends to defeat society's interest in finality of litigation. One aspect of this interest is the maintenance of the deterrent and rehabilitative qualities of the penal sanction, as explained above. Professor Amsterdam has identified other finality considerations:

> "They involve (a) duplication of judicial effort; (b) delay in setting the criminal proceedings at rest; (c) inconvenience and possibly danger in transporting a prisoner to the sentencing court for hearing; (d) postponed litigation of fact, hence litigation which will often be less reliable in reproducing facts (i) respecting the postconviction claim itself, and (ii) respecting the issue of guilt if the collateral attack succeeds in a form which allows retrial (the burden of proof of guilt on retrial, of course, remaining with the prosecutor). In combination, these finality considerations amount to a more or less persuasive argument against the cognizability of any particular collateral claim, *the strength of the argument depending upon the nature of the claim,* the manner of its treatment (if any) in the conviction proceedings, and the circumstances under which collateral litigation must be had." Amsterdam, *Search, Seizure, and Section 2255: A Comment,* 112 U.Pa.L.Rev., 378, 383-84 (1964) (emphasis added).



To the above must be added the more abstract, but no less vital, interest in repose, "a psychological necessity in a secure and active society. . . ." Bator, *supra,* at 452.

Society must bear these costs if the alleged constitutional error affects the integrity or reliability of the fact-finding process (*e.g., Bruton v. United States,* 391 U.S. 123 [1968]; *Gideon v. Wainwright,* 372 U.S. 335 [1963]); if the nature of the violation made it impossible to raise the issue in state proceedings (*e.g., Waley v. Johnston,* 316 U.S. 101 [1942] [coerced plea of guilty]; *Mooney v. Holohan,* 294 U.S. 103 [1935] [knowing use of perjured testimony]; Bator, *supra,* at 455-60); if the state does not provide an adequate corrective process (*cf. Frank v. Mangum,* 237 U.S. 309 [1915]); and, perhaps, if the claim of constitutional error is supplemented with a "colorable claim of innocence" (Friendly, *supra,* at 142, 151-57, 170). But

most search and seizure questions do not fall into any of the above categories. The evidence is reliable and probative of guilt. As the evidence is introduced at trial, there is opportunity to object to its admission; and, in California, there is a manifestly adequate corrective process. *See* Cal.Pen.Code § 1538.5. Application of the exclusionary rule on federal habeas corpus can be justified only if its costs are less than the benefits which society derives from its deterrent effect.

"[T]he case for collateral application of the rule is an anemic one. On collateral attack, the exclusionary rule retains its major liabilities while the asserted benefit of the rule dissolves. For whatever deterrent function the rule may serve when applied on trial and appeal becomes greatly attenuated when, months or years afterward, the claim surfaces for collateral review. The impermissible conduct has long since occurred, and the belated wrist slap by federal courts harms no one but society on whom the convicted criminal is newly released." *Schneckloth v. Bustamonte, supra,* 412 U.S. at 268-69; *accord, Kaufman v. United States, supra,* 394 U.S. at 238-39 (Black, J., dissenting); *cf. In re Sterling,* 63 Cal.2d 486, 487-88, 407 P.2d 5, 7, 47 Cal.Rptr. 205, 207 (1965) (Traynor, C.J.). Professor Amsterdam has stated the matter succinctly: "As the exclusionary rule is applied time after time, it seems that its deterrent efficacy at some stage reaches a point of diminishing returns, and beyond that point its continued application is a public nuisance." Amsterdam, 112 U.Pa.L.Rev., *supra,* at 389.



We pointed out in Argument I-E that a court may apply the exclusionary rule only if the social benefits are greater than the attendant costs. In the context of federal habeas corpus, the costs, in terms of judicial resources, prisoner rehabilitation, duplication of effort, reliability of belated litigation, federal-state harmony and the freeing of guilty men, are apparent and astronomical. The benefits—that the police officer who conducted the search years before will be deterred from future misconduct—are speculative and minimal. To the extent that *Kaufman* and cases citing it hold that the search and seizure claims of state prisoners are cognizable on federal habeas corpus, they should be overruled.[11]

**B. A Search Made In Reliance Upon A Coordinate Branch Of Government Should Not Be Relitigated On Federal Habeas Corpus.**

In the preceding section we argued that no state prisoner, who has had the opportunity to litigate the merits of a search or seizure in state court, should be permitted to relitigate the merits on federal habeas corpus. This Court has asked counsel to consider the narrower question whether the validity of *this* search is an issue cognizable under 28 U.S.C. ~~§ 2254.~~ We suggest the following principle: The availability of federal relief should be dependent

[11]It is doubtful that the views stated in *Kaufman* now command a majority of this Court. *See Cardwell v. Lewis,* 417 U.S. 583, 596 (1974) (Powell, J., concurring); *Schneckloth v. Bustamonte, supra,* 412 U.S. at 249, 250-75 (Blackmun, Powell, and Rehnquist, J.J., and Burger, C.J., concurring); *Chambers v. Maroney,* 399 U.S. 42, 54-55 (1970) (Stewart, J., concurring); *Kaufman v. United States, supra,* 394 U.S. at 242-43 (Stewart, J., dissenting).

upon the extent to which a search has deviated from the norms of due process. A "technical" violation, committed reasonably and in good faith, should not be cognizable on federal habeas corpus. At the other end of the spectrum are searches which are flagrantly abusive of the Fourth Amendment rights. Deterrence in these cases is more likely to be effective; hence, collateral attacks may be justified.

In his concurring opinion in *Brown v. Illinois, supra,* Justice Powell argued forcefully that the reach of the doctrine of "fruit of the poisonous tree" should depend upon the nature of the Fourth Amendment violation: "In my view, the point at which the taint can be said to have dissipated should be related . . . to the nature of the taint." 43 U.S.L.W. at 4943. Thus, all evidence ultimately discovered as a result of an arrest which was physically abusive *(cf. Rochin v. California,* 342 U.S. 165 [1952]) would be excluded in the absence of "some demonstrably effective break in the chain of events leading from the illegal arrest" to the evidence. 43 U.S.L.W. at 4944. However, an arrest "pursuant to a statute that is subsequently declared unconstitutional" is a "technical" violation that calls for correspondingly less exclusion. *Id.* The decision regarding the extent of exclusion should be made "with the deterrent purpose of the Fourth Amendment exclusionary rule sharply in focus." *Id.*

The principle espoused by Justice Powell, that there is a relationship between the nature of the violation and the need for deterrence, is equally applicable here. Suppression of evidence found during a



search conducted in reliance on a warrant later invalidated will have little, if any, deterrent effect because the conduct of the officer was exemplary. If anything, it may discourage the use of search warrants. In seeking a warrant the officer has done what this Court repeatedly has told him to do. Similarly, it is not misconduct to make an arrest under a statute subsequently struck down, because the officer has reasonably relied upon its presumptive validity. In this situation, also, the case for the exclusionary rule on direct review is weak. On collateral review there is no case at all. Police officers, puzzled that evidence seized under a warrant was suppressed on appeal, would be startled if relief is granted on habeas. Worse yet, they probably would not care. The defendant having been convicted so long ago, it is unlikely that anyone would remember him or be concerned about his ultimate release. Therefore, the availability of habeas relief should be foreclosed for the same reason that rule of *Wong Sun (Wong Sun v. United States, supra,* 371 U.S. at 487-88) should be strictly applied. The deterrent effect of the exclusionary rule vanishes at a point close in time to the search. Exclusion of evidence is useless beyond that point.

By contrast, a physically brutal arrest and search or the ransacking of a house without probable cause or a warrant are examples of flagrant police misconduct. The case for the exclusionary rule is more convincing. Police must be taught that such conduct is intolerable. No one seriously doubts that evidence

seized in wanton violation of Fourth Amendment rights should be suppressed. Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 Cal.L. Rev. 929, 951-953 (1965); Wright, *Must the Criminal Go Free if the Constable Blunders?,* 50 Tex.L.Rev. 736, 743-45 (1972). If a conviction based upon evidence seized without any colorable claim of authority survives a direct appeal, it is arguable that federal habeas corpus should be available. If it were not, an occasional police officer might believe that he could engage in such offensive conduct with impunity. In sum, it is possible that there would be deterrent value of the setting aside of such a conviction on federal habeas corpus.[12]

Applying the foregoing analysis to the instant case, it is manifest that the arrest of respondent was, at most, a technical violation—which occurred seven and one-half years ago. Exclusion of evidence will have no effect on Officer Lattin, who probably does not remember respondent. If the exclusionary rule "is aimed at effecting the wider audience of all law

[12]We recognize that there exist myriad intermediate situations in which the good or bad faith of the police officer may not be readily apparent. This uncertainty could make difficult the administration of the above principle (Kaplan, 26 Stan.L.Rev. *supra,* at 1045, 1048, n. 106), but that is true of any new broad rule—including the present exclusionary rule. We are confident that federal courts, charged to act "as law and justice require" (28 U.S.C. § 2243), could formulate workable guidelines to facilitate a predictable and principled application of this standard. As this rule would not yet be available to state courts, no danger exists that state courts could cynically employ it to compromise the interests of society in the enforcement of the Fourth Amendment. *Compare Kaufman v. United States, supra,* 394 U.S. at 225, *with Schneckloth v. Bustamonte, supra,* 412 U.S. at 260 n. 13 (Powell, J., concurring).



enforcement officials and society at large" (Oaks, *supra,* at 710; *United States v. Peltier, supra,* 43 U.S.L.W. at 4926 [Brennan, J., dissenting]), then Officer Lattin's colleagues—and all police officers—will hesitate to enforce a law which has not yet passed constitutional muster in the courts. It is inconceivable and unacceptable that the Fourth Amendment would forbid an officer to discharge his duty. We therefore submit that federal habeas corpus should not be available in this species of case.

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## III

### THE VAGRANCY ORDINANCE OF HENDERSON, NEVADA, IS NOT UNCONSTITUTIONALLY VAGUE.

Before discussing the constitutionality of the vagrancy ordinance, we observe that this Court need not decide that question. The applicability of the exclusionary rule in this case does not depend upon the validity of the ordinance. As explained in Argument I, the evidence was properly admitted even if the ordinance was unconstitutional. As discussed in Argument II, even if the evidence was improperly admitted, that issue should not be relitigated on federal habeas corpus. Thus, for either or both of the above reasons, this Court should reverse the judgment of the court of appeals. Any decision regarding the validity of the ordinance is unnecessary under what we believe to be proper analysis and disposition of this case. This Court should therefore decline to

pass upon this extraneous constitutional question. *Bowen v. United States,* 43 U.S.L.W. 5024, 5025 (1975); *United States v. Raines,* 362 U.S. 17, 21 (1960); *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

Vague statutes violate due process of law because they offend several important values. First, they fail to give fair notice to a person that his contemplated conduct is forbidden by the statute. *Parker v. Levy,* 417 U.S. 773, 752 (1974); *Smith v. Goguen,* 415 U.S. 566, 572 (1974); *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939). "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss,* 347 U.S. 612, 617 (1954); *Palmer v. City of Euclid,* 402 U.S. 544, 546 (1971). Second, impermissibly vague statutes may result in arbitrary and discriminatory enforcement by law enforcement officials and triers of fact. *Smith v. Goguen, supra,* 415 U.S. 572-73; *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972); *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972); *United States v. Reese,* 92 U.S. 214, 221 (1876); Comment, *Recent Supreme Court Developments of the Vagueness Doctrine,* 7 Conn.L.Rev. 94, 100-05 (1974). Third, such a statute may "abut upon sensitive areas of basic First Amendment freedoms," operating "to inhibit the exercise of [those] freedoms. . . ." *Baggett v. Bullitt,* 377 U.S. 360, 372 (1964); *see* Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U.Pa.L.Rev. 67, 75 (1960); Comment, 7 Conn.L.Rev., *supra,* at 105-15.



Nevertheless, "lack of precision is not itself offensive to the requirements of due process." *Roth v. United States,* 354 U.S. 476, 491 (1957). "[T]he Constitution does not require impossible standards." *United States v. Petrillo,* 132 U.S. 1, 7 (1947). "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal fense. . . ." *Id.* at 8; *Miller v. California,* 413 U. S. 15, 28 n. 10 (1973). "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury estimates it, some matter of degree." *Nash v. United States,* 229 U.S. 373, 377 (1913). A jury may be asked to determine whether conduct is "reasonable." *See United States v. Ragen,* 314 U.S. 513, 523 (1942). Although this Court requires a precise statute proscribing specific conduct where First Amendment interests are affected (*see Grayned v. City of Rockford, supra,* 408 U.S. at 109, n, 5; *Smith v. California,* 361 U.S. 147, 151 [1959]), this "Court goes far to uphold state statutes that deal with offenses, difficult to define, when they are not entwined with limitations on free expression." *Winters v. New York,* 333 U.S. 507, 517 (1948).

Finally, it is important to recognize that "there are statutes that by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncer-

tain." *Smith v. Goguen, supra,* 415 U.S. at 577-78. A person "who has received fair warning of the criminality of his own conduct from the statute in question is [not] entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy, supra,* 417 U.S. at 756.

The Court of Appeals identified three elements defined by the ordinance: (1) loitering or wandering on the streets without apparent reason or business; (2) refusal to identify himself or account for his presence; and (3) circumstances indicating to a reasonable man that identification is necessary to public safety. 507 F.2d at 95. With regard to the second element, this Court has held such a criterion is sufficiently precise and is satisfied by contradictory explanation for one's presence on the streets. *Palmer v. City of Euclid, supra,* 402 U.S. at 545. The third element is permissible under this Court's decision in *Terry v. Ohio, supra,* 392 U.S. at 20-21, which permits an officer to act when information of which he is aware would warrant the belief of a reasonable man that official intrusion is appropriate. Under the ordinance, "a peace officer is entitled to act when the surrounding circumstances indicate to a reasonable man that the public safety demands identification. We see no essential difference between the two formulations." *People v. Solomon,* 33 Cal.App.3d 429, 435, 108 Cal.Rptr. 867, 870 (1973). Arbitrary enforcement is forbidden by the objective requirement of reasonableness. *Id.*



Although the first element of "loitering without apparent reason" might be vague under certain circumstances (*cf. Papachristou v. City of Jacksonville, supra,*) respondent cannot take legal advantage of that possibility. *Cf. Parker v. Levy, supra.* Respondent's conduct—his quick movements upon seeing a police officer, his peering over his shoulder at the officer several times, his refusal to acknowledge the officer's attempts to gain his attention—was highly suspicious, clearly indicating that respondent had not lawful or apparent purpose in Henderson, Nevada. As to him, the ordinance was manifestly not vague.[13]

[13]The constitutionality of a similar California statute (Cal. Pen. Code § 647(e)) has repeatedly been upheld by the California courts. *See People v. Solomon,* 33 Cal.App.3d 429, 108 Cal.Rptr. 867 (1973); *People v. Caylor,* 6 Cal.App.3d 51, 85 Cal.Rptr. 497 (1970); *People v. Weger,* 251 Cal.App.2d 584, 59 Cal.Rptr. 661 (1967); *cert. denied,* 389 U.S. 1047 (1968); *People v. Bruno,* 211 Cal.App.2d Supp. 855, 27 Cal.Rptr. 458 (1962).

## IV

### ERROR, IF ANY, WAS HARMLESS BEYOND A REASONABLE DOUBT.

Assuming, without conceding, that the gun should have been suppressed and that the issue of suppression is cognizable on federal habeas corpus, we submit that the error was harmless beyond a reasonable doubt. *Harrington v. California* 395 U.S. 250 (1969); *Chapman v. California,* 386 U.S. 18 (1967). The California court of appeal and the district court have agreed with this conclusion; only the court of appeals has dissented.

The trial record established beyond question that respondent was present in the liquor store when Mrs. Parsons was shot. There is no doubt about his identity or his possession of the murder weapon during the quarrel with Mr. and Mrs. Parsons. Mr. Parsons stated that respondent seized the gun and shot him. Although he did not see respondent shoot his wife, Mr. Parsons heard the shot and returned to find that neither respondent nor the gun was present in the store. Buckley testified that he saw respondent wrest the gun from Mr. Parsons and discharge it; Mrs. Parsons then fell to the floor. After the incident, Buckley told a police officer that respondent "shot the manager's wife. . . ." Chaney testified that he saw respondent grab the gun; he was still in possession of the gun as Chaney fled from the store.

In sum, the evidence other than the gun established conclusively that respondent was at the scene of the crime, was in exclusive possession of the weapon,



and fired the fatal shot. The court of appeals erred in holding to the contrary.

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### CONCLUSION

Petitioner respectfully requests this Court to remand the case to the Court of Appeals for the Ninth Circuit with directions to vacate its opinion and to affirm the order of the District Court denying Powell's petition for writ of habeas corpus.

Dated, August 29, 1975.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1055

W. T. STONE, WARDEN,

*Petitioner,*

v.

LLOYD CHARLES POWELL,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR THE RESPONDENT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

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No. 74-1055

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W. T. STONE, WARDEN,

*Petitioner,*

v.

LLOYD CHARLES POWELL,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## BRIEF FOR THE RESPONDENT

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## QUESTIONS PRESENTED

1. Whether an ordinance which makes it a crime to be a person who

> Loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by a police officer to do so if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification

is unconstitutional because (a) it is vague on its face; (b) it was vague as applied to respondent; (c) it trenches on the right to travel interstate; (d) it violates the presumption of innocence; (e) it creates an unconstitutional presumption in a criminal case; (f) it authorizes arrest and conviction on less than probable cause; and (g) it criminalizes the exercise of the privilege against self-incrimination.

2. Whether evidence seized in a search pursuant to an arrest under the above unconstitutional ordinance may be introduced into evidence.
3. Whether, under the above ordinance, a police officer had probable cause to arrest respondent who was walking with a companion in a shopping center parking lot during daylight business hours, cooperated with the officer when questioned, identified himself and, to the extent asked, gave an account of his presence.
4. Whether this Court should now overrule a line of precedent beginning in 1868 and culminating in a decision only last term, and now remove from habeas corpus jurisdiction (28 U.S.C. §2254) all constitutional claims (including Fourth, Fifth and Fourteenth Amendment violations) which do not go to the issue of innocence or guilt.
5. Whether, in light of the fact that the District Court found that the Henderson, Nevada police officer had probable cause to arrest respondent for violation of an ordinance which at the time of the arrest had not been authoritatively determined to be unconstitutional, respondent's claim that the gun discovered as a result of a search incident to that arrest violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution is one cognizable under 28 U.S.C. §2254.



6. Whether, if the Court decides that jurisdiction is no longer appropriate under 28 U.S.C. §2254, the Court should do so in a purely prospective ruling.
7. Whether admission of evidence of respondent's arrest in possession of the murder weapon, along with introduction of the weapon itself, was error harmless beyond a reasonable doubt.

## STATEMENT OF THE CASE

Respondent adopts petitioner's statement of the case with the following addition.

On July 15, 1970, ten days after the California Supreme Court denied respondent's petition for a writ of habeas corpus, respondent, representing himself, filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. On September 17, 1970 the court entered an order denying the petition. On July 15, 1971, pursuant to stipulation of all parties and counsel, the appeal from this order was dismissed with leave to file an amended petition in the district court. The amended petition was filed on August 24, 1971. The District Court denied the petition, the United States Court of Appeals for the Ninth Circuit reversed, and this Court granted *certiorari*.

## STATEMENT OF THE FACTS

### A. *The Arrest*

At 10:10 a.m. of the morning of February 18, 1968, respondent, Mr. Lloyd Charles Powell, and his compan-

ion, Mr. Chaney, were walking in the parking lot of a shopping center in Henderson, Nevada. At the same time Officer Lattin of the Henderson Police Force was driving his police cruiser by the parking lot. The shopping center was open and there were people in the parking lot (App. 11). Officer Lattin "observed two unidentified to this officer Negro male adult subjects." (App. 5). He testified that "As the two subjects appeared to look at my police unit, they quickly turned and started walking in an opposite direction." (App. 5). As the officer continued to watch Mr. Powell and Mr. Chaney, "the suspects appeared to continue to look back toward my vehicle from time to time and walk in a very rapid manner." (App. 6).

Officer Lattin made a U-turn and, since the two had parted company and were walking in different directions, he radioed another officer that he intended to stop the two, and that he would stop the one who was walking towards the rear of the department store. (Mr. Powell). (App. 6-7). The other officer apparently stopped and arrested Mr. Chaney (Tr. 171). The record does not disclose the basis, if any, for Mr. Chaney's arrest.

Officer Lattin pulled up behind Mr. Powell and honked his horn. Mr. Powell continued walking, and Officer Lattin alighted from his car and said "Wait a minute." Mr. Powell then stopped and turned around (App. 7).[1]

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[1] Petitioner's Statement of Facts states "The officer followed respondent and directed him to halt. Respondent failed to do so, continuing to walk rapidly toward the rear of a department store. The officer finally stepped from his vehicle and ordered respondent to stop." (Petitioner's Brief, pp. 7-8). This could be misleading, since the officer did not "direct Mr. Powell to halt." He merely honked his horn.



Officer Lattin asked Mr. Powell if he had any identification, and he replied that it had recently been stolen. Mr. Powell, however, gave the officer his true name, Lloyd Charles Powell, and his birth date. Officer Lattin ran a records check on the name and birth date, but with negative results (App. 8). Officer Lattin testified that Mr. Powell's appearance matched the age he had given, and that he had no reason to believe the name was false other than his own "suspicious nature." (App. 14).

Officer Lattin then asked Mr. Powell where he had been staying, and he said that he had been staying with friends in Las Vegas (App. 8) for the past few days (App. 16). Mr. Powell said that he did not know the address (App. 8, 17). Then Officer Lattin "asked him where he was en route to which he stated back to Michigan." (App. 9). Officer Lattin testified that he had no reason to doubt that Mr. Powell was going to Michigan (App. 13), and that one of the routes through Henderson could take one to Michigan (App. 12), but that it was "unreasonable in my opinion" to go to Michigan via Henderson.[2]

Officer Lattin did not ask Mr. Powell if he had any money (App. 13), nor does it appear that he ever asked

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[2] Actually, it is more reasonable to travel from Las Vegas to Michigan via Henderson. A traveler in Las Vegas has two obvious routes to Michigan. He can take Highway 15 north to Highway 80, which is the northern route through Wyoming, or he can drop a short distance south on Highway 95 (passing by Henderson) and catch Highway 66, the southern route. A traveler on February 18 (the date of Mr. Powell's arrest) might well have decided to take the milder, southern route rather than risk the severe weather often encountered on Highway 80. Officer Lattin did not bother to ask Mr. Powell why he was taking the southern route.

him why he and his companion were walking in the shopping center in the manner which aroused the officer's suspicion. The officer did not ask why Mr. Powell was going to Michigan via Henderson, nor did he attempt to corroborate any of what Mr. Powell had told him, including his identity, with Mr. Chaney.[3] Instead, Officer Lattin arrested Mr. Powell for vagrancy.[4] Following the arrest, Mr. Powell was searched, and a pistol with six expended cartridges was found in his coat pocket. (App. 18-19).

Sometime after the arrest and search it was discovered that Mr. Powell was wanted in California. He was returned to California and charged with first degree murder. At the trial the trial judge denied respondent's motion to suppress, and Officer Lattin then related the facts and circumstances of Mr. Powell's arrest to the jury (including his attempt to change his name at the Henderson police station) (App. 30). The gun with six fired chambers was introduced into evidence (App. 7, Tr. 275). The jury convicted Mr. Powell of second degree murder, and he was given a sentence of from five years to life.[5]

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[3]Mr. Chaney's nickname is "Detroit." (Tr. 84, 122).

[4]The Henderson vagrancy ordinance provides "Every person is a vagrant who: Loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by any peace officer to do so, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." 507 F.2d at 95.

[5]On August 27, 1975 Mr. Powell was released from prison, and now, pursuant to an arrangement with the State of California, he lives under parole custody in Detroit, Michigan.



B. *The Trial*[6]

On the late evening of February 17, 1968, Mr. John Chaney, Mr. Lester Mercer, Mr. Fred Buckley and respondent, Mr. Lloyd Charles Powell, were in a cocktail lounge when they decided to go to a liquor store and purchase some liquor. (Tr. 132). Shortly after midnight the four men entered the Bonanza Liquor Store, 1052 W. 5th Street, San Bernardino, California (Tr. 8).

Mr. Mercer purchased cigarettes and beer, and was attempting to give Mr. Buckley some change to buy some liquor (Tr. 67). At this time Mrs. Parsons, who was clerking behind the counter, suspected Mr. Powell had stolen a bottle of wine, so she leaned over and asked Mr. Powell about the wine under his jacket (Tr. 31, 68). At about the same time Mr. Parsons, who had been watching Mr. Powell from behind a one-way glass in the rear of the store, came up and confronted Mr. Powell and stated "What about that wine?" (Tr. 31). Mr. Powell responded, "What wine? I have no wine," whereupon Mr. Parsons grabbed his jacket stating, "You're going to pay for the wine that you have under your coat or what are you going to do?" Tr. 11, 31, 68). Mr. Parsons claimed that Mr. Powell struck him in the mouth (Tr. 11), causing Mr. Parsons to become "groggy" (Tr. 34-35).

Mr. Powell may have left the store immediately after this scuffle. (Tr. 12, 135, 169-170). At this time Mr. Parsons asked his wife to hand him the gun which was

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[6]The following review of the trial is relevant only because petitioner has challenged the Ninth Circuit Court of Appeals' finding that introduction of Mr. Powell's possession of the murder weapon was not harmless beyond a reasonable doubt.

kept behind the counter (Tr. 12). This was the same gun later found in Mr. Powell's possession in Henderson, Nevada. She handed him the gun, and he pointed it at the door, but did not see Mr. Powell (Tr. 12-13). Mr. Parsons testified that Mr. Powell re-entered the store, and Mr. Parsons pointed the gun at him and cocked it. From this point in the trial, the witnesses differed sharply as to who had the gun when the fatal shot (killing Mrs. Parsons) was fired, in what order the next three shots were fired, whether the fatal shot was fired during a struggle over possession of the gun, and whether Mr. Powell was even in the room at the time of the fatal shot.

As Mr. Powell walked towards Mr. Parsons, Mr. Parsons claimed that he purposefully fired the gun into the ceiling and then dropped it behind the ice cream freezer. Mr. Parsons claimed that Mr. Powell then went past him, retrieved the gun, and shot Mr. Parsons in the wrist (Tr. 16-17). Mr. Buckley, on the other hand, testified that the gun was never dropped (Tr. 71), but rather when Mr. Parsons pointed the gun at Mr. Powell, Mr. Powell grabbed his arm and a struggle ensued during which the gun went off (Tr. 70). Mr. Powell, Mr. Parsons and Mrs. Parsons were "tussling" over the gun (Tr. 70), and Mrs. Parsons was hitting Mr. Powell on the back of the head with a stamp machine (Tr. 104).

Mr. Chaney's testimony essentially agreed with Mr. Buckley's version. He testified that a struggle over the gun ensued, and that Mrs. Parsons, who weighed 380 pounds (Tr. 187), was throwing things at Mr. Powell and hitting him over the head with a stamp dispenser (Tr. 169). He stated "the lady started throwing things. Came from behind the counter, started hitting Mr. Powell over the head and that's when the gun went off. All three was in a scuffle and I ran out of the store." (Tr. 169).



Contrary to petitioner's Statement of The Facts (Petitioner's Brief, p. 7), Mr. Chaney did not testify that Mr. Powell was in possession of the gun as Mr. Chaney left the store. He testified that Mr. Parsons was "the onlyest person I seen with a gun, yes, sir." (Tr. 169).

There is further confusion as to what happened next. Mr. Parsons testified that after he was shot in the wrist, he ran into the back room to get yet another gun, and that while he was out of the room he heard a shot and a scream. As he was returning, he heard the cash register bell ring, and he saw Mr. Buckley, the only person in the store, leaning over the cash register. He shot at Mr. Buckley, and the bullet ricocheted off the cash register and struck Mr. Buckley in the left arm (Tr. 18-19, 79). Mr. Buckley fled from the store. It was then that Mr. Parsons discovered that Mrs. Parsons had been shot.

Mr. Buckley, who was the only witness who testified that he was in the room at the time Mrs. Parsons was shot, gave several different versions of these events, and they all differed from Mr. Parsons' version. First, Mr. Buckley testified that he did not see Mrs. Parsons get shot (Tr. 73).[7]

The prosecutor then attempted to refresh Mr. Buckley's recollection and impeach his testimony with a statement taken from Mr. Buckley by a police officer.

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[7]Q. Did you see her get shot?

A. No, I didn't see her get shot. I heard the discharge but I didn't see her actually get shot.

Q. Who had the gun at that time?

A. At this time I can't rightly say who had the gun.

Q. Why can't you rightly say?

A. Because, like I said, it was a scuffle in the back there and they was wrestling with the gun and I can't rightly say who had the gun. There was three people back there.

The statement was taken at the hospital while Mr. Buckley was intoxicated, suffering from loss of blood from the gunshot wound in his arm (Tr. 109, 110-111), and under arrest for the attempted murder (Tr. 89, 118). In that statement the officer wrote "The first shot went into the ceiling and the second struck Buckley in the left arm. Buckley said that the next thing he knew was that Lloyd had the gun and first of all shot the manager's wife and then the manager." (Tr. 79). Mr. Buckley testified that he could not recall making that statement (Tr. 79), and at the preliminary hearing he had also denied that it was an accurate reflection of what he had said (Tr. 81). It is also different from the order in which Mr. Parsons testified the events occurred.

The prosecution also attempted to impeach Mr. Buckley with his preliminary hearing testimony in which he stated that Mrs. Parsons had "lunged toward" Mr. Powell "and the gun discharged." (Tr. 80). Later in his testimony, Mr. Buckley said that the gun went off during the struggle, and Mrs. Parsons fell after the second shot (Tr. 103-04). According to Mr. Buckley, the last shot struck Mrs. Parsons, after which everybody left the room, *leaving Mr. Buckley alone with Mrs. Parsons during the time Mr. Parsons was getting the second gun* (Tr. 109, 117). *It was at this time that Mr. Parsons testified the fatal shot was fired.* (Tr. 18-19).

The Court adjourned for the Memorial Day holiday, and when court resumed, Mr. Buckley changed his testimony and then testified for the first time that he "believed" he saw the gun in Mr. Powell's hand (Tr. 85-86, 124-25). Mr. Buckley did not explain why he changed his testimony; he merely stated to the prosecutor "Whatever you ask me, I believe I can answer it." (Tr. 85). The record, however, does reflect that Mr. Buckley



had originally been arrested and charged with the murder (Tr. 90, 118, 126), and he knew that he could still be recharged with the murder (Tr. 91-92). There was also strong evidence that he attempted to take money from the cash register (Tr. 18-19, 87-88). Even after he changed his testimony, there were times when he was equivocal about who had possession of the gun (Tr. 105).[8]

With the evidence in this posture, the jury was told that Mr. Powell was found on the same day in Henderson, Nevada in possession of Mr. Parsons' gun. They were also told that Mr. Powell attempted to change his name at the Henderson police station after his vagrancy arrest. Mr. John Davidson, a criminalist, testified that ballistics tests indicated that the fatal bullet was fired from the gun found in Mr. Powell's possession (Tr. 235-40). Since Mr. Powell was found in possession of the fatal weapon, the District Attorney argued that the only issue in the trial was "intent," (Reporter's Partial Transcript 28, 37, 29) (hereinafter R.P.T.), and he proceeded to use the weapon to demonstrate the deliberate effort required to pull its trigger, arguing "that it doesn't fire accidentally and it doesn't hit people accidentally either." The jurors were told to pull the trigger in order to decide for themselves whether or not it was likely that it went off accidentally or whether or not it was fired with the requisite intent to convict. (R.P.T. 37, 38). The District Attorney was even careful to underscore the fact that, while only three or four shots were fired in the store, by the time the gun was taken from Mr. Powell the

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[8] Q. Did you ever actually see it in his hand?

A. This is not very clear. I don't remember. I can't say that I actually seen the gun in his hand at any time.

rest of the shots had been fired. "We find the gun later in the possession of this defendant in Henderson, Nevada. There was an interesting point there. Remember we had six expended shell cartridges in the gun when the gun was recovered. . . . In any event, we don't explain the other two expended cartridges." (R.P.T. 40). The jury was left to supply its own explanation, and the jury convicted Mr. Powell of second degree murder.

## SUMMARY OF ARGUMENT

In February, 1968, respondent was arrested for vagrancy while walking with a companion during daylight business hours in an open shopping center in Henderson, Nevada. The arrest was unconstitutional because, as the Court below held, the vagrancy ordinance under which respondent was arrested was unconstitutionally vague in that it failed to give fair notice of the proscribed conduct. The ordinance also violated the Fourth Amendment right to be free from unreasonable searches and seizures because it authorized full custodial arrests and prosecution based on mere suspicion.

Pursuant to this arrest, respondent was searched and a pistol was found which was later introduced into evidence at his subsequent trial for murder. Since the only justification for the search was an arrest in violation of respondent's Fourth and Fourteenth Amendment rights, we argue that the court below was correct in holding that the evidence should have been suppressed.

Suppression of the evidence is also appropriate because the ordinance, which requires a suspect to have an "apparent reason or business" and requires him to "identify himself and account for his presence," violates the



Fifth Amendment right against self-incrimination, the presumption of innocence, and the right to travel interstate. The ordinance makes it a crime for a suspect to refuse to answer a police officer's questions concerning his identity and his suspicious conduct. Since respondent was arrested because, in the officer's view, he had refused to "identify himself and to account for his presence," his arrest was in violation of the Fifth Amendment. Since the ordinance places the burden on the suspect to persuade the officer of his innocence, it violates the presumption of innocence. Since the ordinance requires a traveler to have a "reason or business" to be on the streets of Henderson, it violates the fundamental right to travel interstate. The direct fruits of a search incident to the arrest must, therefore, be suppressed.

Respondent was arrested because of the manner in which he was walking and because he appeared to be looking at the police car. When stopped, he gave his true name and birth date. He was not asked to account for his presence in the shopping center, but he did tell the officer that he was on his way to Michigan and had been staying with friends in Las Vegas. Everything transpired in broad daylight in a business district, and the arresting officer knew of no recent crimes which could be attributed to respondent. Consequently, we argue that the ordinance is unconstitutional as applied to respondent's conduct because it did not give him fair notice that *this* conduct was proscribed. In the alternative, we argue that the arresting officer did not have probable cause to believe that respondent had violated the ordinance. In either event, the arrest was invalid and the evidence seized in the search pursuant to the arrest should have been suppressed.

The reasons for the suppression rule extend even more clearly to an arrest under an ordinance which violates the Fourth, Fifth and Fourteenth Amendments than they do to an arrest which is unconstitutional only because the individual officer makes a mistake. The existence and enforcement of unconstitutional laws threatens the security of every citizen. The purpose of general deterrence of unconstitutional conduct is served because legislatures will be aware of this Court's decisions and will refrain from passing such laws. The Court's judicial integrity is clearly called into question because if the evidence is admitted, the law is given the Court's imprimatur. Moreover, failure to suppress would undermine this Court's historical duty to uphold the Constitution by judicially reviewing and nullifying unconstitutional legislation. In numerous cases this Court has suppressed evidence seized under the authorization of unconstitutional statutes.

Petitioner's suggested "alternatives" to suppression are insufficient. Declaring the ordinance invalid without suppressing the evidence would violate the case or controversy requirement of Article III. It would also be inappropriate because it would remove all incentive to make suppression motions, in the future, since they would be a waste of time for the arrested citizen. The alternative of bringing a declaratory judgment action is inadequate because standing requirements are very strict and it would make vindication of petitioner's rights depend on whether some other potential vagrant decides at some time to file a declaratory judgment action. Given the class of people who are commonly arrested for vagrancy, that is unlikely. Finally, the alternative of declaring the ordinance unconstitutional in a prosecution for vagrancy is sufficient only if the arrest is taken through prosecution, and the vagrant's lawyer, if any, pursues the matter



vigorously on those grounds. It provides no relief for those wrongfully arrested but not prosecuted. Since one of the primary purposes of laws such as this is to facilitate investigation, the purpose is fulfilled by the arrest, and prosecution seldom follows.

Petitioner argues that federal habeas corpus should not be available to review Fourth Amendment claims of state prisoners. The jurisdictional grant (28 U.S.C. §2254) has existed in its present form since 1867. Ever since *Ex parte McCardle*, 73 U.S. 318, 325-26 (1868), decided one year after its adoption, the section has been interpreted consistently with its plain meaning to include within its ambit all imprisonment in violation of the Constitution, laws and treaties of the United States. Critics of the rule have pressed Congress on numerous occasions to modify habeas corpus jurisdiction, yet Congress has steadfastly refused to do so. Congress, when fully aware of these arguments, reconfirmed the scope of habeas corpus jurisdiction by re-enacting the statute in 1966. For this Court to judicially modify the jurisdictional statute would be to usurp the prerogative of Congress to define the scope of jurisdiction of the lower federal Courts.

Not only has Congress rejected proposed limitations on the scope of federal habeas corpus, but the arguments of those critical of the present rule are not well founded. Since suppression is designed to accomplish both special and general deterrence, the fact that a ruling comes late is of no importance. Fourth Amendment claims are particularly appropriate for federal review because, since they do not go to the question of guilt or innocence, they are less likely to be given sympathetic treatment by state courts. Any "friction" which may exist between state and federal courts is a product of the Fourth Amendment and not the existence of federal habeas corpus. In addition

Congress has struck the appropriate balance between state and federal courts by requiring exhaustion of remedies and by giving state factual proceedings a limited res judicata effect. The number of habeas corpus filings is a misleading gauge of the time federal courts must spend to resolve them. The vast majority do not result in hearings and are easily disposed of. Since this Court alone handles approximately 4,000 petitions a year, the distribution of between 9,000 and 11,000 filings throughout the federal system is not unduly burdensome. The burden on this Court could, however, be intolerable since prisoners would have no choice but to proceed directly to this Court. Moreover, since it is not known how many of the petitions involve only Fourth Amendment issues, the impact of eliminating Fourth Amendment issues is purely speculative. In fact, under petitioner's proposed rule, each of these petitions would still have to be examined in order to determine whether the petitioner had had a fair opportunity to raise the issue in the state court.

Even if "mine run" Fourth Amendment claims were to be eliminated from federal habeas corpus, the present case is particularly appropriate for federal review because it involves the constitutionality of a state statute which is a virtual primer of constitutional violations. Both Congress and this Court have recognized the special appropriateness of federal review of state decisions upholding the constitutionality of state statutes. Since the statute is still on the books in Nevada (and also California), a decision striking it down at this time would be as timely as if the arrest had occurred yesterday.

If this Court decides to eliminate all Fourth Amendment claims from the scope of federal habeas corpus, we urge the Court to do so in a purely prospective opinion. Respondent did not appeal or apply for *certiorari* to this



Court because the availability of federal habeas corpus was clear under this Court's opinions. Since the time has passed to apply for direct review to this Court, it would be unconscionable to deprive respondent of all access to federal court by changing the rule in his case. This Court rendered a purely prospective ruling in a similar situation. *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411(1964).

Finally, we argue that introduction of respondent's possession of the murder weapon, the weapon itself, and respondent's attempt to change his name after his arrest was not harmless error in a trial where the jury not only had to decide the question of guilt, but the degree of the crime.

## ARGUMENT

### I

### BY REQUIRING A SUSPICIOUS PERSON TO IDENTIFY HIMSELF AND TO ACCOUNT FOR HIS PRESENCE, THE HENDERSON ORDINANCE VIOLATES THE FIFTH AND FOURTEENTH AMENDMENT RIGHT NOT TO INCRIMINATE ONESELF.

One of the elements of the crime of vagrancy in Henderson is the refusal of the suspect to "identify himself and account for his presence." (See fn. 4, *supra*) Assuming for the purpose of argument that this clause is sufficiently definite to meet constitutional standards of fair notice (See Part III, *infra*) the ordinance makes the exercise of one's constitutional right not to incriminate oneself an element of the crime for which the suspected

vagrant is arrested.[9] Needless to say, it cannot be made a crime to invoke the Fifth Amendment.

One of the underlying reasons for the Fifth Amendment right to remain silent in the face of governmental interrogation, which is applicable to the states through the Fourteenth Amendment (*Malloy v. Hogan*, 378 U.S. 1 (1964)), is the protection of the citizen from "the cruel trilemma of self-accusation, perjury or contempt." *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1963); See *Michigan v. Tucker*, 417 U.S. 433, 445 (1974). In case after case, beginning with *Boyd v. United States*, 116 U.S. 616 (1886), this Court has assiduously protected the right against self-incrimination by giving the Fifth Amendment a liberal interpretation and by forbidding the attachment of penalties to its invocation. See *e.g.*, *Brooks v. Tennessee*, 406 U.S. 605 (1972) (may not require defendant to testify as first defense witness); *Davis v. Mississippi*, 394 U.S. 721, 727 n.6 (1967) ("[T]he police have the right to request citizens to answer voluntarily questions concerning unsolved crimes [but] they have no right to compel them to answer."); *Spevak v. Klien*, 385 U.S. 511 (1967) (may not discipline attorney for invocation of privilege in disciplinary proceedings); *Terry v. Ohio*, 392 U.S. 1, 34 (1967) (may not compel suspect to answer police questions or base probable cause on failure to answer) (concurring opinion of White, J.); *Griffin v. California*, 380 U.S. 609 (1965)

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[9] Although the self-incrimination issue was briefed and argued in the District Court and the Court of Appeals for the Ninth Circuit, the latter did not decide the issue since the ordinance was found to be unconstitutionally vague and in violation of the Fourth Amendment.



(may not comment on failure of defendant to take the stand); *Malloy v. Hogan*, 378 U.S. 1 (1964) (contempt); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1963) (contempt).

The Court has not confined the right to the literal language of the amendment, and has expanded it to include police questioning. *Michigan v. Tucker*, 417 U.S. 433 (1974); *Davis v. Mississippi, supra*, 394 U.S. at 727 n.6; *Miranda v. Arizona*, 384 U.S. 436 (1966). Even in the context of regulatory schemes whose purpose is ostensibly non-criminal, the privilege has been held to apply if the people from whom information is sought are a "highly selective group inherently suspect of criminal activities." *Albertson v. SACB*, 382 U.S. (1965) (required registration of communist party members); *Leary v. United States*, 395 U.S. 6 (1969) (marijuana tax); *Grosso v. United States*, 390 U.S. 62 (1968) (gambling tax); *Marchetti v. United States*, 390 U.S. 39 (1968) (gambling tax); *Haynes v. United States*, 390 U.S. 85 (1968) (firearm registration). Even a statute requiring no more than identification in a non-criminal context was barely upheld as constitutional by this Court in a plurality opinion with four dissenters. *California v. Byers*, 402 U.S. 424 (1971) (hit and run statute). But *cf. Davis v. Mississippi, supra*, (illegally seized fingerprint evidence suppressed).

Against this backdrop, the continued existence of a law which not only does not allow the suspect to invoke the privilege "in the unfettered exercise of his own free will" (*Malloy v. Hogan, supra*, 378 U.S. at 8), but actually makes it a crime to refuse to answer the officer's interrogation, is an anachronism. The ordinance, by requiring a suspect both to identify himself, and to account for his presence, goes much further than the

hit-and-run statute upheld in *Byers, supra*. The ordinance does not even employ the pretext of being part of a non-criminal regulatory scheme such as the hit-and-run statute in *Byers*, the ostensible purpose of which was enforcement at civil liabilities arising from auto accidents.[10] In addition, those singled out for interrogation

[10]When faced with a constitutional challenge to California's disorderly conduct law, a statute worded identically to the Henderson ordinance, the California Court of Appeals acknowledged that a statute requiring more than identification would violate the right against self-incrimination. *People v. Solomon*, 33 Cal. App.3d 429, 108 Cal. Rptr. 867 (1973). The court, therefore, gave the statute a narrow construction restricting its requirements to identification only.

The California court, basing its decision on *California v. Byers, supra*, held that it does not violate the Fifth Amendment to require a criminal suspect to identify himself. There is no support for this conclusion in *Byers* because the *Byers* case dealt only with a statute designed for a non-criminal purpose. The *Solomon* court, however, recognized that the disorderly conduct statute was designed for a criminal purpose—the prevention and detection of crime. Moreover, the position that identification is non-testimonial, and that, therefore, compelled identification cannot violate the Fifth Amendment, was endorsed by only four members of this Court in *Byers. Cf., Davis v. Mississippi, supra*, in which fingerprint evidence was suppressed because seized in violation of the Fourth Amendment.

The *Solomon* decision is of little relevance to the present case because there is no Nevada decision giving the Henderson ordinance a narrow construction. It is also clear that Officer Lattin believed that the ordinance required more than mere identification because he testified that he arrested respondent for violation of the ordinance "due to the fact that the subject had no *real* answer as far as where he had been staying nor the friends that he was with *nor could give me a reason for being in the Henderson area*.... (App. 9) (Emphasis added)



are members of a "highly selective group inherently suspect of criminal activities." In fact, before acting under the ordinance, the officer must first believe that the public safety demands the inquiry. The clear purpose of this ordinance is to assist officers in detecting crime by requiring suspects to respond to an officer's interrogation. One can hardly imagine a law more directly violative of the Fifth Amendment than an ordinance subjecting a suspect to arrest, search and conviction for invoking it.

## II

## THE ORDINANCE VIOLATES DUE PROCESS OF LAW BECAUSE IT CREATES AN UNSUPPORTABLE PRESUMPTION OF GUILT AND IT SHIFTS THE BURDEN OF PROOF TO THE DEFENDANT, THUS ALLOWING CONVICTION ON LESS THAN PROOF BEYOND A REASONABLE DOUBT.

The ordinance also violates due process of law because the requirement that the suspect account for his presence in effect shifts the burden to the suspect to either persuade the officer that his suspicions are unfounded or be convicted of a crime for failure to do so. As such, it creates an invalid presumption that loiterers and wanderers have committed crimes. Such a presumption is invalid unless this Court can at least say with fair assurance that the underlying fact (wandering or loitering) makes it more likely than not that the presumed fact (apparently that criminality is afoot) is true. Manifestly, there is no basis on which such an assumption can be made. "The implicit presumption in these generalized vagrancy standards—that crime is being nipped in the

bud—is too extravagant to deserve extended treatment." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972); *See Turner v. United States*, 396 U.S. 398 (1970); *Leary v. United States*, 395 U.S. 6 (1969); *Johnson v. Wright*, 509 F.2d 828 (5th Cir. 1975); Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 Stan. L. Rev. 341 (1970).

In addition, the ordinance shifts the burden of proof to the suspect, requiring him to establish his innocence without first requiring the prosecution to at least show a prima facie case of guilt. The ordinance therefore violates the constitutionally required rule that the prosecution must establish guilt beyond a reasonable doubt (*In re Winship*, 397 U.S. 358 (1970). *See Lego v. Twomey*, 404 U.S. 553 (1972); *Johnson v. Wright, supra.*; Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 Crim. L. Bull. 205, 228-29 (1967)), and it substitutes an inquisitorial system for the constitutionally required accusatorial system invisioned by the Fourth, Fifth and Fourteenth Amendments.



## III

## THE HENDERSON ORDINANCE VIOLATES THE FOURTH AND FOURTEENTH AMENDMENTS BECAUSE IT DOES NOT GIVE FAIR NOTICE OF THE CONDUCT CONSIDERED CRIMINAL AND BECAUSE IT AUTHORIZES FULL CUSTODIAL ARRESTS AND SEARCHES FOR CONDUCT JUSTIFYING NO MORE THAN A BRIEF DETENTION.

The Henderson ordinance reads:

> Every person is a vagrant who: Loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by a police officer to do so if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

*The ordinance is unconstitutionally vague on its face and as applied*

A conjunction of three elements is necessary for one to be guilty of vagrancy under the ordinance. It is required that the suspect be a person who (1) "loiters or wanders upon the streets or from place to place without apparent reason or business," (2) "refuses to identify himself *and* to account for his presence," when (3) "surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." Each one of these three elements, which have never been construed narrowly or otherwise by the Nevada courts, is unconstitutionally vague.

This Court has already ruled that a clause virtually indistinguishable from the first element of the Henderson

ordinance is unconstitutionally vague on its face. In *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), the offending language of the ordinance read in part

> [P]ersons wandering or strolling around from place to place without any lawful purpose or object . . . shall be deemed[11] vagrants . . . . 405 U.S. at 156-57 n.1

This Court struck down the ordinance because it was

> void for vagueness, both in the sense that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, *United States v. Harriss*, 347 U.S. 612, 617, and because it encourages arbitrary and erratic arrests and convictions. *Thornhill v. Alabama*, 310 U.S. 88; *Herndon v. Lowry*, 301 U.S. 242.

The Court went on to say that the law provides no guidelines by which enforcement authorities may distinguish between innocent and unlawful conduct, and, by allowing arrest and conviction on suspicion, it invited arbitrary and erratic application by placing almost unfettered discretion in the hands of the police. The law cast its net so broadly that it included within its ambit innocent activities which are part of the amenities of life as we have come to know it in the United States. *Papachristou, supra*, 405 U.S. at 164.

The few differences between the Jacksonville and the Henderson ordinance exacerbate the vagueness of the latter. While the Jacksonville ordinance criminalized "wandering . . . without any lawful purpose," the Henderson ordinance permits the arrest of one who "wan-

[11] *See also Smith v. Florida*, 405 U.S. 172 (1972).



ders . . . without apparent reason or business . . . ." Thus, while the Jacksonville ordinance at least attempted to limit its scope to people with other than lawful purposes, the Henderson ordinance criminalizes simple strolling with no purpose in mind. This kind of simple strolling is one of the amenities of life which may not be made criminal. *Papachristou, supra*, 405 U.S. at 164-65. In addition, not only must one have a "reason or business" in order to walk in Henderson, but that reason or business must be "apparent." One consulting this ordinance and attempting to hue his conduct to its mandate would be at a complete loss as to how he is to make his "reason or business," assuming he must have one, "apparent."

By requiring one to have an apparent reason or business in order to be in Henderson, this ordinance also trenches on the fundamental right to travel interstate. *Shapiro v. Thompson*, 394 U.S. 618, 629-33; *Edwards v. California*, 314 U.S. 160, 178-81 (1941); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908); *United States v. Guest*, 383 U.S. 745, 757 (1966). Officer Lattin admitted that he placed respondent under arrest because he did not recognize him (App. 5, 11), and he "could not give me a reason for being in the Henderson area . . . ." (App. 9). Interstate travelers need not deviate from the most direct route at the peril of being arrested by local police because the city council does not want strangers in its town without apparent reason or business. Amsterdam, *supra*, 3 Crim. L. Bul. at 213. When a law trenches on a fundamental right, the law must be drawn with sufficient precision so that citizens may pursue a lawful course of conduct without fear of being caught within the net of the overly broad, vaguely drawn law. Note, *The Void-*

*For-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 104 (1960); Amsterdam, *supra*, 3 Crim. L. Bul. at 213-14. While this rule has been often applied in First Amendment cases (*Lewis v. City of New Orleans*, 415 U.S. 130, 133 (1974)), there is no reason to believe that the right to travel interstate is entitled to any less protection than the right to free speech.

> [E]ven though the governmental purpose by legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same purpose. *Aptheker v. Secretary of State*, 378, 500, 508 (1964).

One year prior to *Papachristou*, this Court unanimously held that the phrase "without visible or lawful business," was unconstitutional *as applied* to someone discharging a woman (whose name he claimed not to know) from his automobile late at night, under somewhat suspicious circumstances. *Palmer v. City of Euclid*, 402 U.S. 544 (1971). Two Justices would have held the phrase unconstitutional on its face. If the Euclid ordinance was unconstitutionally applied under the suspicious circumstances of the *Palmer* case, then the phrase "without apparent reason or business" (a more vague injunction than the Euclid ordinance) is unconstitutional if applied to a citizen walking with a companion in a shopping center during daylight business hours. Certainly, Mr. Powell's reason or business in the shopping center was as "apparent" as Mr. Palmer's nighttime business was "visible." See *Palmer, supra*, at 546.

The second element of the Henderson ordinance (that of refusing to identify himself and to account for his



presence), in addition to being in flagrant violation of the right against self-incrimination (See Part I, *supra*), suffers from the same infirmities of vagueness. When Mr. Powell was asked for his name and birth date, he gave them truthfully. If the ordinance is to be construed to require that a citizen do more in order to "identify himself," "it is quite unreasonable . . . to charge [respondent] with notice that such would be the construction of the ordinance. 'The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.' " *Palmer, supra*, 402 U.S. at 545.

In addition to requiring that the citizen identify himself, the ordinance is written in the conjunctive and requires that the suspect go further and "account for his presence." This latter phrase would be a nullity if any account, no matter how bizarre or unreasonable, were to satisfy the requirements of the statute. It must be that something more is required–either a "good" account, or a "satisfactory" account, or an account "satisfactory to the officer." The ordinance is silent as to what kind of account is required, therefore it is even more vague than similar "good" or "satisfactory" account statutes that have been invalidated in other cases. See *Ricks v. District of Columbia*, 414 F.2d 1097, 1104-05 (D.C. Cir. 1968); *Baker v. Binder*, 274 F. Supp. 658, 664 (W.D. Ky. 1967); *United States v. Margeson*, 259 F. Supp. 256, 268-69 (E.D. Pa. 1966).

Officer Lattin testified that he arrested Mr. Powell "due to the fact that the subject had no *real* answer as far as where he had been staying *nor the friends that he was with nor could give me a reason for being in the Henderson area* . . . ." (App. 9) (Emphasis added). It is clear, therefore, that Officer Lattin interpreted the ordi-

nance as demanding an account which was satisfactory to him. Thus, the vagueness of the ordinance invites arbitrary application and entrusts law making "to the moment-to-moment judgment of the policeman on his beat." *Smith, supra*, 415 U.S. at 578. In *Papachristou*, this Court quoted with approval from President Roosevelt's message vetoing a proposed District of Columbia "account" statute and his reasoning that

> [W]hile this phraseology may be suitable for general purposes as a definition of a vagrant, it does not conform with accepted standards of legislative practice as a definition of a criminal offense . . . . It would hardly be a satisfactory answer to say that the sound judgment and decisions of the prosecuting officers must be trusted to invoke the law only in proper cases. 405 U.S. at 166-67 n. 10.

The Henderson ordinance could hardly be a better example of a law illustrating these defects.

The "account" provision of the ordinance is also vague as applied to respondent. After inquiring as to respondent's identify, Officer Lattin asked respondent where he was staying and where he was going. (R.T. 8-9). Respondent replied that he had been staying with friends in Las Vegas (he did not know their address), and that he was going to Michigan (App. 8, 9). The officer testified that he had no reason to disbelieve that respondent was going to Michigan (App. 13), that one could in fact go to Michigan through Henderson (App. 12), but that in his opinion it was "unreasonable" to go to Michigan that way. (App. 18). This ordinance can hardly be said to put one on notice that an account of one's presence in Henderson would require the names and addresses of people with whom one had been staying for the past few days in another city. Likewise, the ordinance gives no



warning that being bound for another state by other than a route a police officer considers "reasonable" would not be a sufficient account of one's presence. See *Palmer, supra*, 402 U.S. at 546.

The final element of the offense under the Henderson ordinance ("surrounding circumstances . . . indicate to a reasonable man that the public safety demand such identification") provides even less guidance to the citizen than the first two elements. The ordinance does not provide that the citizen must know what circumstances give rise to the officer's suspicion, nor does it provide that the officer is to inform the citizen. In the present case, Officer Lattin never asked respondent to explain his conduct in the shopping center, nor did he tell respondent what had given rise to his suspicions. He had no idea, therefore, what respondent's explanation would have been. Thus, under the terms of the ordinance and on the facts of this case respondent was arrested for a crime an element of which was both beyond his knowledge and beyond his control. Not only does this clause fail adequately to inform the citizen what is proscribed, it fails to inform him at all.

Petitioner's reliance on *Terry v. Ohio*, 392 U.S. 1 (1968) (Petitioner's Brief, p. 52) is misplaced. While an officer may be justified in a brief detention in order to make a limited inquiry under circumstances described by the ordinance, nothing in *Terry* would suggest that the *Terry* standard of reasonable suspicion may be made an element of an offense justifying arrest and booking. Indeed, the Court was held to the contrary:

> We allow our police to make arrests only on "probable cause," a Fourth and Fourteenth Amendment standard applicable to the States as well as to the Federal Government. Arresting a person on

> suspicion, like arresting a person for investigation, is foreign to our system, even when the arrest is for past criminality.
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> . . .
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> A direction by a legislature to the police to arrest all "suspicious" persons would not pass constitutional muster. *Papachristou, supra*, 405 U.S. at 169. (Footnotes omitted)

Likewise, this Court held in *Davis v. Mississippi*, 394 U.S. 721, 726 (1969) that

> Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions." (Footnotes omitted)

It is submitted that the Court should add "vagrancy" to its list of terms used to justify unreasonable detention.

While a vague standard might be tolerated as a justification for a limited stop and inquiry, it would be intolerable to use the same standard as an element of a crime justifying full arrest, search and prosecution. It is hard to imagine a more open invitation to discriminatory enforcement, because "whether or not a suspect is hauled off to jail for suspicious loitering depends, for all intents and purposes, upon the whim of the policeman." *People v. Berck*, 3 N.E.2d 411, 414, 32 N.Y.2d 567, *cert. denied*, 414 U.S. 1093 (1973) (clause reading "circumstances which justify suspicion that a person may be engaged or about to engage in crime" held unconstitutionally vague and violative of the Fourth Amendment); *United States ex rel. Newsome v. Malcolm*, 429 F.2d 1166, 1173 (1974) *aff'd sub nom. Lefkowitz v. Newsome*,__U.S.__ (1975).



> Under our system suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest. *Henry v. United States*, 361 U.S. 98, 104 (1959).

Petitioner argues that even if the statute is vague, respondent was given sufficient warning by the ordinance to know that his conduct was proscribed. (Petitioner's Brief, 51-53). Fundamental to this argument is the assumption that respondent has done something which, under a more specific and narrowly drawn ordinance, could be proscribed.[12] But it cannot be made a crime to arouse the suspicions of a police officer (*Papachristou, supra*, 405 U.S. at 169); it cannot be made a crime to refuse to incriminate oneself (See Part I, *supra*); and it cannot be made a crime to be in a Henderson shopping center on one's way to Michigan. *Shapiro v. Thompson, supra*. Thus, an ordinance which perfectly described respondent's conduct in the shopping center would still not justify his arrest.

It is also essential to this argument that the ordinance have some hard core of meaning which respondent may fairly be said to have transgressed. *Parker v. Levy, supra*, 417 U.S. at 746.[13] It is submitted that the Henderson

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[12] See *Smith v. Goguen, supra*, 415 U.S. at 577-78; *Parker v. Levy*, 417 U.S. 733, 756 (1974); *Lewis v. City of New Orleans*, 415 U.S. 130, 133 (1974).

[13] Petitioner's reliance on *Parker v. Levy* is misplaced. Lieutenant Levy was prosecuted for "conduct unbecoming an officer and a gentleman" (Uniform Code of Military Justice, Art. 133) because of his anti-war activity while in the service. The Court held that the differences between military and civilian society justified the application of the *more permissive standards of vagueness that apply to criminal statutes regulating economic affairs*. The Uniform

ordinance, like the law struck down in *Smith v. Goguen*, *supra*, is so palpably vague with respect to each of its elements that it has no hard core of meaning.

Finally, even if it can be said that the statute might be clear enough to reach some conduct, it did not clearly reach respondent's conduct. Based on Officer Lattin's brief observation of respondent, it cannot be said that he was loitering or wandering. Whatever "apparent reason or business" may mean, it is clear that everything respondent did in broad daylight was "apparent." Although when the officer honked his horn, respondent continued walking, when requested to stop, he did so. At the request of the officer he identified himself and gave his birth date. He did not produce a driver's license or other identification because he did not have any. He did not "account" for his manner of walking with his companion in the shopping center because Officer Lattin never asked him to do so. He was merely asked where he was going, and he replied that he was going back to Michigan. There is nothing in the ordinance which would indicate that a person subjects himself to arrest for looking at a police officer who is also looking at him while making a U-turn. Nor can it be said that inability to relate with whom one had been staying in a different city for the past several days is clearly a failure to account for one's presence in

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Code of Military Justice also requires that the Code be explained to each enlisted man during his first six months of service. The Code also contained a number of illustrative examples of proscribed conduct in its appendix. Moreover, the Court noted that the special nature of military life was such that members of the military would be imbued with an awareness of uniquely military crimes.

By contrast, petitioner was merely a civilian walking in the parking lot of an open shopping center.



Henderson. While it could be argued that this ordinance fairly reaches a midnight prowler in a high crime neighborhood who refuses to answer the questions of the police, this is clearly not such a case.

## IV

## RESPONDENT'S FOURTH, FIFTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN HE WAS ARRESTED UNDER THE UNCONSTITUTIONAL ORDINANCE.

Petitioner asks this Court to hold that a city council may pass an unconstitutional ordinance which violates the Fourth, Fifth, and Fourteenth Amendments, and then allow the prosecuting authorities to use any evidence seized in searches pursuant to arrests for the unconstitutional crime. Petitioner's first argument in support of this novel rule is that there is no violation of the Fourth Amendment because the officer acted in good faith reliance on the ordinance, and the ordinance does not violate the Fourth Amendment because "*no* statute can violate the amendment."[14] (Petitioner's Brief, p. 14).

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[14] There are numerous cases to the contrary. *United States v. Brignoni-Ponce*, 43 U.S.L.W. 5028; *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of New Hampshire*, 403 U.S. 443 (1976); *Berger v. New York*, 388 U.S. 41 (1967); *Stanford v. Texas*, 379 U.S. 476 (1965); *Boyd v. United States*, 116 U.S. 616 (1886); *See Sibron v. New York*, 392 U.S. 40 (1969). In each of these cases the Court invalidated a legislatively authorized search which violated the Fourth Amendment. In *Camara* and *See* convictions for refusal to

Petitioner's argument is not only contrary to a venerable line of this Court's precedent, but it amounts to a caricature of bureaucratic buck-passing. Petitioner attempts to fragment the government in such a way that arrests and searches may be unconstitutionally conducted, yet no branch of the government will be responsible. Thus, under petitioner's view, the courts are not responsible because they do not make the arrest and are only passive recipients of the fruits of the search; the police are not responsible because they are told to do it by the legislature; and the legislature is not responsible because it only tells the police to do it, but does not actually do it itself. This incredibly casual view of the right to privacy protected by the Fourth Amendment is supported neither by the language and policy of the amendment[15] nor by any prior decision of this Court in which the issue has been presented.

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allow the search were set aside. In *Brignoni-Ponce, Almeida-Sanchez, Coolidge, Sibron* and *Berger* the evidence was suppressed. In *Stanford* and *Boyd* (Fourth and Fifth Amendment) the evidence was ordered returned.

Interestingly, in petitioner's brief in support of the petition for the writ of *certiorari*, petitioner distinguished respondent's cases on the grounds that the statutes relied upon by the officers "dealt directly with the standard and procedures governing searches and did not attempt to define a substantive crime. In short, each involved legislative encroachment upon Fourth Amendment rights." (Petition for Writ of Certiorari, pp. 17-18). Petitioner has now abandoned this position in favor of the novel argument that there is no such thing as a legislative encroachment upon Fourth Amendment rights.

[15] "The concept of evidence—the conceptual setting of any constitutional guarantee pertaining to evidence—compels attention to the whole transaction, to use as well as acquisition. Or in other words, fragmentation of the transaction is as arbitrary as fragmentation of the government. The Fourth Amendment fragments



One need look no further than the Fourth Amendment itself to see that petitioner reads the Constitution too narrowly. The amendment provides

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . .

The amendment obviously was intended to serve the broad purpose of protecting citizens from "*unreasonable governmental intrusions* into the privacy of one's person, house, papers, and effects," *United States v. Calandra*, 414 U.S. 338, 353 (1974) (Emphasis added); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). The amendment clearly does not stand for the proposition that the people are to be secure only from unreasonable arrests and searches conceived by the police, but the city council may direct arrests, searches and seizures at will.

> [T]he Fourth Amendment was intended to secure the citizens in person and property against unlawful invasion of the sanctity of his home by the officers acting under legislative or judicial sanction. This protection is equally extended to the action of the government and officers of the law acting under it . . . . *Weeks v. United States*, 232 U.S. 383, 294 (1914); *Adams v. New York*, 192 U.S. 585, 598 (1903).

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neither the transaction nor the government. Its meaning is that when any part of the government participates in an evidentiary transaction which involves an unreasonable search and seizure it commits a constitutional wrong. And for any part of the government to commit a wrong denominated as such by the Fourth Amendment is not just a wrong in the abstract, but to violate a person's constitutional right." Schrock and Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 Minn. L. Rev. 251, 302 (1975).

In short it is inconceivable that the drafters of the Fourth Amendment could on the one hand condemn unreasonable police conduct, and at the same time approve of legislation directing the police to make unreasonable arrests. "The struggle against arbitrary power in which they [the framers of the Constitution] had been engaged for more than twenty years, would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred." *Boyd v. United States*, 116 U.S. 616, 630 (1886); *See Stanford v. Texas*, 379 U.S. 476, 481-85 (1965). The fact that petitioner can cite numerous cases which speak in terms of deterring the police (*See* Petitioner's Brief, p. 15-16) merely reflects the happenstance that in the vast majority of cases it is at the enforcement level rather than at the legislative level that the decision to engage in unconstitutional conduct is made.[16]

In addition to the plain meaning of the Fourth Amendment, this Court has consistently held in a line of cases beginning as early as 1886 that legislatively authorized searches and seizures can violate the Fourth Amendment. In *Boyd v. United States, supra*, a federal law requiring a defendant in a penalty or forfeiture proceeding to produce his books and papers was held to violate the Fourth and Fifth Amendments. In *Berger v. New York*, 388 U.S. 41 (1967), this Court struck down New York's wire tap statute and suppressed evidence seized in good faith compliance with the statute. In the same year this Court voided prosecutions for refusal to permit warrantless inspections for housing code violations. *Camara v. Municipal Court, supra; See v. City of Seattle*, 387 U.S. 541 (1967). In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), this Court held that even though probable cause may have existed to support issuance of a warrant, evidence seized pursuant to a warrant issued by the Attorney General under authority of a state statute must be suppressed. The Fourth Amendment was violated in spite of the statutory authorization for the search and the reliance by the searching officers on a written search warrant. *See also Stanford v. Texas*, 379 U.S. 476, 481 (1965) (even assuming warrant authorized by state statute and issued on probable cause, evidence ordered returned). Again, in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), this Court suppressed evidence discovered by immigration officers even though the search was made in strict compliance with Section 287(a) of the Immigration and Nationality Act, 8 U.S.C. §1357(a), and the regulations promulgated thereunder (8 C.F.R. §287.1). This Court stated that "it is clear, of course, that no Act of Congress can authorize a violation of the Constitution." *Id.* at 272.[17] This holding was reaffirmed only last term in *United States v. Brignoni-Ponce*, 43 U.S.L.W. 5028.

[16] Even the existence of laws such as the Henderson ordinance can violate the Fourth Amendment. Although a citizen has never been stopped, searched or arrested under a vagrancy law, clearly it is impossible to be "secure" from unreasonable searches and seizures so long as these laws are on the books and present a real threat of enforcement. *See Alderman v. United States*, 394, U.S. 165, 203 (1969) (Fortas, J., dissenting). If this is not so, then respondent certainly cannot bring the declaratory judgment action petitioner suggests respondent could have filed in order to assure himself that he could walk the streets of Henderson unharassed. (Petitioner's Brief, pp. 36-37).

[17] *See also Sibron v. New York*, 392 U.S. 40, 59 (1968) ("the question . . . is not whether the search [or seizure] was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. . . .").

Although it did not involve application of the suppression rule, *Papachristou* is squarely on point. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), involved a vagrancy ordinance with elements similar to the Henderson Ordinance. In striking down the ordinance, this Court said:

> We allow our police to make arrests only on "probable cause," a Fourth and Fourteenth Amendment standard applicable to the States as well as to the Federal Government. Arresting a person on suspicion, like arresting a person for investigation, if foreign to our system, even when the arrest is for past criminality.
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> A direction by a legislature to the police to arrest all "suspicious" persons would not pass constitutional muster. A vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest. *Papachristou, supra*, 405 U.S. at 169.[18]

It is this error with respect to the scope of the Fourth Amendment which also leads petitioner to the erroneous conclusion that good faith belief that the ordinance has been violated is all that the Fourth Amendment requires. The amendment forbids unreasonable searches and seizures, so it is clear that a policeman's good faith in making an arrest does not satisfy the Fourth Amendment. *Beck v. Ohio*, 279 U.S. 89, 97 (1964); *Henry v. United States*, 361 U.S. 98, 102 (1959). In *Whitely v.*

[18] *People v. Berck*, 300 N.E.2d 411, 414-415, 32 N.Y.2d 567, *cert. denied*, 414 U.S. 1093 (1973); *United States ex. rel. Newsome v. Malcolm*, 492 F.2d 1166, 1173 (2d Cir. 1974), *aff'd on other grounds sub nom., Lefkowitz v. Newsome*, 417 U.S. 967 (1974).



*Warden*, 410 U.S. 560 (1971), this Court rejected the argument that an arrest was valid because the arresting officer, relying in good faith on a police bulletin indicating the defendants were wanted, made an arrest. The good faith and probable cause of the arresting officer could not be used as a shield against inquiry into the underlying constitutionality of the arrest. *See also, Coolidge v. New Hampshire, supra*, 403 U.S. at 450 (Search violates Fourth Amendment in spite of existence of search warrant).

This same error leads petitioner to conclude that if probable cause existed under the ordinance, then it follows that the Fourth Amendment has not been violated. (Petitioner's Brief, pp. 14-21). Obviously, an arrest, and the search pursuant thereto, may be unreasonable even though authorized by a statute if the statute authorizes unreasonable arrests. *Papachristou, supra*, 405 U.S. at 169. This conclusion is so obvious that it was assumed in *Brignoni-Ponce, supra, Almeida-Sanchez, supra, Whitely, supra, Coolidge, supra, Berger, supra, Sibron, supra, Stanford, supra* and *Beck, supra*. Indeed, *Almeida-Sanchez* and *Brignoni-Ponce* are paradigmatic examples of officers acting in complete good faith under a statute and yet, because the statute authorized unreasonable searches and seizures, the Fourth Amendment was violated.

The "probable cause" requirement is merely a shorthand way of describing what the Fourth Amendment requires of an arresting officer, *assuming that the law under which he acts is constitutional*. Since most criminal laws are not constitutionally suspect, satisfaction of the probable cause requirement is usually all that is necessary to satisfy the Fourth Amendment. The Ninth Circuit,

however, found that the Henderson ordinance was unconstitutional precisely because it is a legislative encroachment upon the Fourth Amendment. The Court said:

> It should be emphasized that the ordinance is also incompatible with incorporated Fourth Amendment principles. A vagrancy ordinance of this kind "conflict[s] with the deeply rooted Fourth Amendment requirement that arrests must be predicated on probable cause." *United States ex rel. Newsome v. Malcolm, supra,* 492 F.2d at 1172. *See also Papachristou, supra,* 405 U.S. at 169-70; *Hall v. United States,* 459 F.2d 831 (D.C. Cir. 1972) (*en banc*), *noted in* 47 N.Y.U.L. Rev. 595 (1972) and 18 Vill. L. Rev. 117 (1972).
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> As these authorities reflect, such a vagrancy ordinance subverts the "probable cause" requirement in two ways. It authorizes arrest and conviction for conduct that is no more than suspicious. A legislature could not reduce the standard for arrest from probable cause to suspicion; and it may not accomplish the same result indirectly by making suspicious conduct a substantive offense. Vagrancy statutes do just that, for they authorize arrest and conviction for the vagrancy offense if there are reasonable grounds to suspect that the accused may have committed, or if left at large will commit, a more serious offense. Police are duty-bound to investigate suspicious conduct, and founded suspicion will support an investigative stop and inquiry. *Wade v. United States*, 457 F.2d 335, 336 (9th Cir. 1972). But more is required to justify arrest. *Henry v. United States*, 361 U.S. 98, 101, 104 (1959).
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> The "probable cause" requirement is negated by such vagrancy ordinances in a second way. Their language is so general and vague, the elements of the offense so obscure, that they afford no reasonable criteria by which an officer may determine whether the ordinance has or has not been violated. Because



> a man of reasonable caution cannot form a reasonable belief as to whether such an ordinance has been violated, an officer cannot "gauge justification for [vagrancy] arrests consistently with Fourth Amendment principles." *Hall v. United States, supra,* 459 F.2d at 837. 507 F.2d at 96-97 [Footnote omitted].

## V

## EVIDENCE SEIZED PURSUANT TO AN ILLEGAL ARREST AUTHORIZED BY A STATUTE WHICH VIOLATES THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS MUST BE SUPPRESSED.

### A. Suppression is the most appropriate remedy for a statutory violation of the Fourth Amendment.

The continued vitality of the suppression rule in both state and federal prosecutions can hardly be doubted.[19] *United States v. Brignoni-Ponce, supra; United States v. Almeida-Sanchez, supra; Brown v. Illinois, supra.* The appropriateness of applying the suppression rule even though the official conduct was authorized by statute is also clear. The principal is both as venerable as *Boyd, supra* (decided in 1886) and as current as *Brignoni-Ponce, supra* (decided in 1975).

Petitioner, however, argues that since the Henderson ordinance does not merely authorize searches, but rather

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[19] The exclusionary rule has at times been criticized and its efficacy questioned. *Brown v. Illinois*, 45 L. Ed.2d 416, 425 n. 5 (1975).

defines an unconstitutional crime for which a citizen may be arrested, searched *and jailed*, application of the suppression rule is inappropriate. (Petitioner's Brief, pp. 24-39). Far from discouraging unreasonable searches and seizures, petitioner's argument would positively encourage repressive legislation in violation in the Fourth Amendment.

For example, it is clear that evidence seized pursuant to a statute authorizing the search of all Mexican appearing individuals within 100 miles of the border would be suppressed. *Almeida-Sanchez, supra.* However, under petitioner's view, if Congress simply had gone further and made it a crime to be a Mexican appearing individual (whether or not within 100 miles of the border) then any evidence seized in a search pursuant to an arrest for this unconstitutional crime could be used with impunity. This anomalous result is contrary to the reasons for the Fourth Amendment, the exclusionary rule, and the role of this Court as the ultimate arbiter of the constitutionality of state and federal legislation.

Although deterrence and judicial integrity are most often cited as the reasons for the suppression rule, something more fundamental may be offered in its defense. The "exclusionary rule" is simply the consequence of the rule of law and the appropriate relationship of the federal courts to the other branches of our government, including the states. The principle is as well established as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), in which Chief Justice Marshall stated:

> If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established theory; and would seem, at first view, an absurdity too gross to be insisted on. *Id.* at 177.



This specific function of the exclusionary rule as judicial review was recognized by this Court in *Terry v. Ohio, supra*, when the Court said "[I]n our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur." *Terry, supra*, 392 U.S. at 13. So, too, failure to suppress the evidence seized pursuant to an arrest under the vagrancy ordinance has the necessary effect of legitimizing the unconstitutional law.

It has long been the rule that the courts give the constitution force and effect by not giving force and effect to governmental conduct that violates the constitution. *Marbury v. Madison, supra*; T. Schrock and R. Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 Minn. L. Rev. 251, 325 (1974); Note, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 U.C.L.A. L. Rev. 1129, 1155-59 (1973). This has particularly been true when the unconstitutional conduct is legislative, as it is in the present case. It has not been thought necessary in other contexts to justify depriving the government of the fruits of unconstitutional legislation on the grounds that nullifying the conduct will "deter" the legislature or government officials from acting unconstitutionally in the future. For example:

> When the Supreme Court strikes down an act for violating the First Amendment is it not punishing congressmen for violating their duty to uphold the Constitution but is simply declaring the statute invalid—thereby itself upholding the Constitution. Schrock and Welsh, *supra* at 356.

Over the years courts have fallen into the pattern of thinking that upholding the Fourth Amendment in contrast to upholding any other amendment in the Bill of Rights, is justified if and only if it punishes and deters those who would violate its commands.

> One factor which may account for these different reactions is that Wigmore and others have repeatedly called exclusion punishment. Another and more influential factor is that the Fourth Amendment duty the police are under has always been more visible than the First Amendment duty imposed on legislators, because imprisonment of the policeman has always been conceivable, whereas no one has suggested jailing congressmen. Perhaps the punishability of Fourth Amendment violations affects our view of exclusion and makes us think of it merely as an alternative to, say, incarceration. But no amount of explaining why we are led to think of exclusion as punishment will make it punishment if it is not. And if it is not punishment or some other deterrent sanction, it is judicial review. That is the dominant and sufficient constitutional fact. If it is also a fact that exclusion deters, then whatever deterrence there is, as Justice Brennan says, is "only a hoped-for effect of the exclusionary rule, not its ultimate objective." *Id.* at 356-57 (Footnotes omitted).

Petitioner has not met the burden of showing exactly why the Fourth Amendment should be treated as a constitutional "stepchild"[20] unentitled to the same

[20] A. Amsterdam, *Perspectives on the Fourth Amendment*, 59 Minn. L. Rev. 349, 363 (1974).



dignity of judicial recognition as any other clause in the Constitution.

Aside from the above, several other reasons for the exclusionary rule have been advanced, and each indicates that suppression is appropriate in this case. Justice Holmes viewed the suppression doctrine as simply a necessary corollary to the rule forbidding acquisition of evidence in a certain manner.

> [t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

The Fourth, Fifth and Fourteenth Amendments forbid the acquisition of evidence in the manner used in this case. Forbidding acquisition in this manner would be practically pointless unless use of the evidence in court is forbidden.

In addition, prohibiting the use of unconstitutionally seized evidence in a court of law has long been thought to be compelled by judicial integrity and the need, over the long run, to preserve popular trust in government. "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp v. Ohio*, 367 U.S. 643, 659 (1961); *Terry v. Ohio*, 392 U.S. 1, 12-13 (1968); *Elkins v. United States*, 364 U.S. 206, 222-23 (1960). The continuing vitality of the concern for judicial integrity was recently reconfirmed in *Brown v. Illinois*,—U.S.—, 456 L. Ed.2d 416, 425 (1975).[21]

[21] The preservation of the integrity of the Court, and the Court's role in the judicial review of unconstitutional governmental conduct under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) are closely related.

> [W]hen the Court taints its integrity by creating such a remedy, as it does by employing the deterrence rationale to

This reason for the exclusionary rule takes on even greater force when the unconstitutional intrusion is legislative rather than the isolated transgression of a police officer. One might be inclined to forgive a "constable's blunder" made under circumstances requiring quick and uncounseled judgment. A police officer's transgression, even if willful, may be the product of unique facts, and it may never be repeated. Usually, it is a matter of low profile and little public awareness. An unconstitutional statute or ordinance, on the other hand, is more highly visible to the public at large, and the very existence of such statutes has an impact on the security and well-being of the public reaching far beyond the individual case. The body of criminal law is an official declaration to every citizen, which he is presumed to know, that if he does not hue his conduct to the legislatively prescribed standard, he can be arrested, fined and incarcerated. It is impossible to measure the impact on the quality of life laws like the Henderson ordinance have had on citizens who merely wished to enjoy the amenities of life in this country. *Papachristou, supra*, 405 U.S. at 164. Nor is it possible to say how many thousands of innocent citizens

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limit the scope of (or, potentially, abolish completely) the exclusionary rule, an irreconcilable conflict is simultaneously created with the concept of judicial review. Note, 20 U.C.L.A. L. Rev., supra at 1159.

The duty of this Court to uphold the Constitution, recognized in *Marbury*, derives both from the Constitution's status as the "*supreme* law of the land" (5 U.S. (1 Cranch) 137, 180 (1803) (emphasis in original)), and from the oath each justice of the United States must take. The oath reads:

> I . . . do solemnly swear . . . that I will . . . discharge and perform all duties incumbent upon me . . . *agreeably to the Constitution and laws of the United States* . . . 28 U.S.C. §453 (1970).

*See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1903).



have been harassed under the command of this and similar laws. *Almeida-Sanchez, supra*, at 273 n. 5. A well counseled legislative encroachment on constitutional freedoms should not be given the imprimatur of the judiciary by allowing the unfettered use of the fruits of such an invasion. A legislative invasion of the Fourth, Fifth and Fourteenth Amendments, far from being merely "technical,"[22] is reprehensible.[23]

The rule which petitioner urges on the Court would render this Court impotent to put a stop to this kind of official harassment. Moreover, petitioner would deny the Court even the right to refuse to allow itself to be used as the forum in which the purpose (use as evidence) of the illegal conduct is finally accomplished. This situation would erode respect for the power and integrity of the Court, and for the rule of law.

The final reason for the exclusionary rule, deterrence, is the reason given most stress in recent opinions of this Court. See *e.g., Brown v. Illinois, supra; United States v.*

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[22] *Brown v. Illinois, supra*, 45 L. Ed.2d at 432 (concurring opinion of Justice Powell).

[23] "Fourth Amendment violations become more, not less, reprehensible when they are the product of government policy rather than an individual policeman's errors of judgment. See *Alderman v. United States*, 394 U.S. 165, 203 (1969) (Fortas, J. dissenting).

. . . .

Obviously, any rule intended to prevent Fourth Amendment violations must operate not only upon individual law enforcement officers but also upon those who set policy for them and approve their actions. Otherwise, for example, evidence derived from any search under a warrant could be admissible, because the searching policeman, having had a warrant approved by the designated judicial officer, had every reason to believe the warrant valid." *United States v. Peltier*, ____U.S. ___, 45 L. Ed.2d at 393 n. 18 (dissenting opinion of Justices Brennan and Marshall).

*Calandra, supra*. Petitioner argues that deterrence is the only current rationale for the exclusionary rule (Petitioner's Brief, pp. 26, 31-25). From the above discussion, it is clear that this is a false premise. See *Brown v. Illinois, supra*. Petitioner then argues that only deterrence of unconstitutional police conduct is the object of the rule (an unjustifiedly narrow reading of the Fourth Amendment).[24] Finally, petitioner adds the minor premises that either the deterrent purpose is not served by suppression, or the alternative of declaring the statute unconstitutional in a prosecution for vagrancy or a declaratory judgment action is so superior to suppression that the court should ignore the illegal manner in which the evidence was secured in favor of waiting until such future time as a vagrant may file a declaratory judgment action or be prosecuted under the Henderson ordinance. Reasoning from these faulty premises, not surprisingly petitioner arrives at the erroneous conclusion that suppression is inappropriate. (Petitioner's Brief, pp. 35-37).

Nothing in logic or reason suggests that while the Henderson police should be discouraged from illegal arrests, the Henderson City Council should be permitted to order arrests without regard to the Fourth Amendment. Indeed, *Brignoni-Ponce, supra*, and *Almeida-Sanchez, supra*, could hardly be more squarely on point. See also *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Sibron v. New York*, 293 U.S. 40 (1968); *Berger v. New York*, 388 U.S. 41 (1967); *Stanford v. Texas*, 379 U.S. 476 (1965). As the Ninth Circuit correctly observed,

[24] See the discussion of the scope of the Fourth Amendment, Part IV, *supra*.



"the public interest is served by deterring legislators from enacting such statutes." 507 F.2d at 98; 47 N.Y.U.L. Rev. 595, 602 604 (1972).[25] Surely, if the United States Congress could not authorize unconstitutional searches in order to assist in the almost impossible task of policing our border (*Brignoni-Ponce, supra; Almeida-Sanchez, supra*) the Henderson City Council may not give its police a roving commission to arrest and jail people whom they believe are "suspicious."

The deterrence rationale underlying the exclusionary rule is even more appropriate when the constitutional violation is legislative than it is when the violation is the isolated conduct of an individual officer. Not only is the infringement on the Fourth Amendment more reprehensible, but one of the reasons given for adoption of the exclusionary rule is the lack of any other realistic remedy, such as damages against the officer. *Mapp v. Ohio, supra*, 367 U.S. at 651-53, 670.

> We have been compelled to reach that conclusion [that suppression is appropriate] because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the

[25] Although the deterrence rationale applies well to state legislators and Congress, it is even more appropriately applied to local governmental units such as the Henderson City Council. A city council is more directly responsible to a small electorate, so its decisions are more likely to reflect local, parochial interests. A local campaign to "un-handcuff the police" and to "clean up the streets" could easily manifest itself in unconstitutional, repressive legislation unless the decisions of this Court make it clear that such a course of conduct would be futile. See Note, 47 N.Y.U.L. Rev. 595, 602 (1972).

> courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers .... Experience has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures. The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court. *People v. Cahan*, 44 Cal.2d 434, 445, 282 P.2d 905, 911-12 (1955); quoted with approval in *Elkins v. United States*, 364 U.S. 206, 220 (1960).

When the constitutional violation is legislative, not only would the practical problems of a damage remedy be as insurmountable, but there is neither a right to sue the officer (*Pierson v. Ray*, 386 U.S. 547 (1967)), nor a right to sue the legislators. *Barr v. Matteo*, 360 U.S. 564 (1959); *Tenney v. Brandhove*, 341 U.S. 367 (1951); See *Monroe v. Pape*, 365 U.S. 167 (1961).

Even if a tort remedy were available, it would not be an adequate remedy to vindicate Fourth Amendment rights. Unsympathetic juries, difficulties in securing counsel, fear of retribution, and the practical problems of pursuing the claim from prison make the remedy only theoretical. Note, *The Fourth Amendment Exclusionary Rule: Past, Present, No Future*, 12 Amer. Crim. L. Rev. 507, 530-53 (1975); Spiotti, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. Legal Studies 243, 269-70 (1973); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L. Rev. 493, 499 (1955). This Court, however, need not decide what substitutes, if any, may be constitutionally adequate in lieu of suppression. Since none are forthcoming, suppressing is clearly the most appropriate remedy in this case.



Petitioner states "we contend exclusion could not have any deterrent impact on the governing body of Henderson, Nevada; Respondent was tried and convicted in California for violation of a California law; the reversal of his conviction and possible release would be of no concern to Nevada legislators." (Respondent's Brief, p. 37). It is difficult to comprehend exactly what the thrust of this argument is.

If petitioner means that Nevada legislators will not read Supreme Court opinions, the argument may be dismissed out of hand. If it is meant that one state may violate the Fourth Amendment and turn the evidence over to another state for prosecution, it should fare no better than the "silver platter" doctrine did even prior to *Mapp v. Ohio*. See *Elkins v. United States*, 364 U.S. 206 (1959). If petitioner means that Nevada is not concerned with the presence of California criminals within its borders, then petitioner is simply mistaken. The states are not little Balkan nations offering safe haven to one another's rogues. There is no reason to believe that a San Diego robber is any more welcome in Henderson than he would be in Los Angeles. Crime prevention and protection is a joint venture among all of our governments, state and federal. This joint venture starts with the basic extradition provisions of the Constitution and continues through the national, computerized information retrieval systems into which states feed and from which states may retrieve information within minutes. For example, in one recent case the Las Vegas police stopped a hitchhiker and checked his name through the National Crime Information Center (NCIC). See 28 U.S.C. §534 (1968). They received information that he was wanted on a California warrant for parole violation. The parole violation warrant had been sent to the NCIC by the Monterey, California

police; however, they had failed to notify the NCIC that the warrant had been satisfied five months prior to the present defendant's stop. Based on this erroneous information, the Las Vegas police arrested and searched the hitchhiker. The search turned up a shotgun which was the basis for a federal prosecution. The evidence was suppressed. *United States v. Mackey*, 387 F. Supp. 1121 (D. Nev. 1975).

Moreover, petitioner's argument evidences a misunderstanding of the kind of deterrence the suppression rule is designed to accomplish. When the Court holds a search unconstitutional it is not addressing itself exclusively to the officer or legislature that caused the search. The ruling is addressed to all law enforcement agencies and all governing bodies. The deterrent effect should be general, not special, and the ruling is expected to be given appropriate weight by all governments. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 709-10 (1970). There is hardly a better vehicle for achieving this kind of deterrence than suppressing evidence seized pursuant to unconstitutional legislation. If this Court suppresses the evidence seized under the Henderson ordinance, then it is unlikely that any legislative body—local, state or federal—is again going to adopt a vagrancy ordinance like the Henderson one only to see arrests and searches under it invalidated and the evidence suppressed.

This finally leaves for consideration petitioner's argument that the possibility (never realized to date) that the law may be declared unconstitutional in a prosecution for vagrancy is a sufficient deterrent to make suppression inappropriate. This suggestion ignores the nature and purpose of vagrancy laws, and its adoption would make it possible for outrageously oppressive laws to remain on



the books for years to be used as an excuse for illegal arrests and searches (at the same time immunizing the police from civil suit, see *Pierson, supra*). Furthermore, if such a rule were adopted, it is unlikely that the law would ever be declared unconstitutional.

Vagrancy laws are used primarily as procedural devices which allow the police to circumvent traditional constitutional safeguards. Conviction is seldom the object of a vagrancy arrest, therefore it is seldom sought. While at one time it was thought that idle people and undesirables should be jailed (See *Edwards v. California, supra*, 314 U.S. 160, 177 (1941)), the law today is, like the law in *Almeida-Sanchez, supra*, primarily an investigatory tool used to remove people from the streets who may be "up to no good" and to search and investigate for evidence of crime.[26] Indeed, petitioner concedes as much. (Petitioner's Brief, p. 23). Since the purpose of the law is satisfied by the stop, search, and occasional night or weekend in jail, in many cases the police will merely stop, search and release the individual. In cases of actual booking, prosecutors will not prosecute. Since the police enjoy immunity from civil suit as long as the statute is not authoritatively declared unconstitutional, it would be a foolish prose-

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[26] Not only is it clear that this is the police practice under the vagrancy laws, See n. 12 and accompanying text, *infra*, but the legislative history indicates that this practice reflects the legislative purpose. For example, the legislative history of the California Disorderly Conduct Statute (Cal. Penal Code §647(e)), which is identical to the Henderson ordinance, reflects just such a legislative purpose. Lafave, Arrest 355 n. 50. This is true of other similar statutes in other jurisdictions. *Id.* at 259 n. 67. Indeed, common sense would indicate that suspicious persons who do not give persuasive accounts for their conduct are not being arrested and punished simply for that circumstance. The obvious purpose of the law is to enable the officer to arrest in order to investigate.

cutor indeed who would jeopardize the continued utility of a vagrancy law by prosecuting for vagrancy and risking a declaration of unconstitutionality.[27]

Since the primary purpose of these laws is to facilitate arrests rather than to punish vagrancy, the pattern of truncating the proceedings short of conviction has already established itself in many jurisdictions. For example, in *People v. Williams*, 55 Misc.2d 774, 286 N.Y.S.2d 575 (New York City Crim. Ct. 1967) the court said

> these defendants are 41 of a group of alleged prostitutes who have been arrested and detained 2500 times for disorderly conduct and loitering in New York City since August 18th . . . This Court of its own knowledge is aware that except for a few isolated instances where defendants pleaded guilty, the disorderly conduct cases were dismissed. In many instances, "the girls" were arrested after 11:30 P.M., too late to be arraigned, . . . then kept overnight in a cell. In the morning they were brought to Court and released because the offenses for which they had been arrested could not be proven to have been committed by them. 286 N.Y.S.2d at 577.

Professor Lafave discovered similar patterns in his research on arrest. Lafave, Arrest (1965). If the questioning and search incident to the arrest for vagrancy did not produce sufficient evidence of a substantive crime to

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[27] A meaningful constitutional challenge to a prosecution under a vagrancy law is made even less likely because the crime of vagrancy seldom would merit the constitutional right to counsel. It is likely that the impecunious class of persons who bear the brunt of these laws would use any money they may have access to for bail, rather than to hire a lawyer. Lafave, Arrest 340.



justify arrest, but the officer thought that further investigation was appropriate, the citizen would be booked for vagrancy and jailed. If the night or weekend in jail provided sufficient time to complete the investigation, the citizen would be either charged with the substantive crime, or, in the event nothing was discovered, the vagrancy charges would be dropped and he would be released. *Id.* at 151, 339, 354-60, 371-72. This practice has been amply documented by other courts and commentators.[28] Indeed, it has been stated:

> [I]t is sufficiently notorious to be a fitting subject of judicial notice that arrests for vagrancy are often made simply as a pretext for a search (or interrogation) which it is hoped will turn up evidence of a crime which the police "merely suspect" the defendant has committed, is committing or will commit and for which the police therefore cannot constitutionally arrest. *Worthy v. United States*, 409 F.2d 1105, 1111 (D.C. Cir. 1968) (dissenting opinion).

Thus, viewed in the context in which vagrancy laws operate, as a practical matter vagrancy laws do not define

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[28] See *e.g.*, *Hall v. United States*, 459 F.2d 831, 836 (D.C. Cir. 1972 (en banc)), Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 Crim. L. Bul. 205, 226-27 (1967); *Report of the President's Commission on Crime in the District of Columbia*, 570 (1966); Douglas, *Vagrancy and Arrest On Suspicion*, 70 Yale L.J. 1, 9-10, 12-13 (1960); Foote, *Vagrancy-Type Law and Its Administration*, 104 U. Pa. L. Rev. 603, 628-30 (1956); Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 Harv. L. Rev. 1203, 1218-19, 1225 (1953); Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L. Rev. 102, 129-30 (1962); Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 Yale L.J. 1351 (1950); Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. Chi. L. Rev. 345, 368-69 (1936).

crimes of any substance. They are laws enabling police to engage in unconstitutional arrests and searches. The only practical difference between the law struck down in *Almeida-Sanchez, supra*, and the Henderson ordinance is that the suspected vagrant may not only be unconstitutionally searched, but he may also suffer the additional indignity of being unconstitutionally arrested and jailed. A decision by this Court denying a citizen the right to suppress evidence seized pursuant to such an arrest would virtually guarantee that this practice will continue indefinitely.

Petitioner's suggestion that the availability of a declaratory judgment action is a sufficient deterrent to the adoption of these laws is equally as unrealistic.[29] The

[29] At one point petitioner suggests that before applying the exclusionary rule "this Court—or any court—must balance its costs against its benefits." (Petitioner's Brief, p. 26-27). Respondent respectfully suggests that the cost of allowing some guilty people to go free was balanced against the benefit of protecting citizens from unreasonable arrest when the Fourth Amendment was adopted. "It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest." *Henry v. United States*, 361 U.S. 98, 104 (1959). In this respect, the Fourth Amendment is no different than other great procedural safeguards such as the presumption of innocence and the right against self-incrimination. Both the right against self-incrimination and the presumption of innocence assume that as a consequence of the rule, in numerous instances the guilty will go free. The Fourth Amendment, in this regard, is no different. Indeed, had Officer Lattin and the Henderson City Council acted consistently with the Constitution, Mr. Powell would not have been arrested and searched. Suppression of the evidence hardly injures the public interest in conviction any more than the Fourth Amendment itself would have frustrated this interest had it been observed in the first instance. If the Fourth Amendment has struck



simple fact is that the availability of the remedy is substantially circumscribed by the requirement of an actual controversy mandated by the Declaratory Judgment Act (28 U.S.C. §2281) and by Art. III of the Constitution (*Ellis v. Dyson*, ___U.S.___, 44 L.Ed.2d 274 (1975)).[30]

One could hardly expect a citizen who wants to travel to send his lawyers before him to file declaratory judgment actions in the cities in which he may wish to walk. It will be a rare case, indeed, in which a citizen with the appropriate standing, assets, and quixotic idealism files a declaratory judgment action to have a vagrancy law declared unconstitutional. See *Anderson v. Nemetz*, 474 F.2d 814, 817, 821 (9th Cir. 1973) (civil rights action holding a "roams about from place to place without any lawful business" statute so clearly unconstitutional that is

the wrong balance, then it may be amended through the appropriate constitutional process.

In addition, it is an overstatement to argue that suppression results in the release of guilty defendants. To be sure, when the only evidence in the case has been illegally seized, then release follows suppression. However, in more serious cases, such as this one, there is often other evidence sufficient to go to trial. Likewise there are often lesser included offenses for which the defendant may be convicted. Kaplan, *The Limits of The Exclusionary Rule*, 26 Stan. L. Rev. v. 1027, 1036 (1974). In fact, in this case petitioner argues that introduction of the illegally seized evidence was harmless beyond a reasonable doubt. (Petitioner's Brief, pp. 54-55). At a retrial, respondent might be convicted again, although a new conviction might well be for involuntary or voluntary manslaughter.

[30] Nevada's Declaratory Judgment Act (Nev. Rev. Stat. 30.040 (1973)) is likewise restricted since it "shall be so interpreted and construed . . . to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees." Nev. Rev. Stat. 30.160.

"no longer a litigable issue . . . .") The impecunious and parapetic class of people who bear the brunt of vagrancy laws (*Papachristou, supra*; Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L.J. 1, 4, 13 (1960)), and the unavailability of a damage remedy, further decreases the efficacy of this remedy. Moreover, a similar remedy would have been as available in *Brignoni-Ponce, supra*, and *Almeida-Sanchez, supra*, yet this Court still ordered the evidence seized in those cases suppressed. Thus, the hypothetical possibility that someone in the future may judicially attack this law in some other proceeding is the functional equivalent of no remedy at all. It is certainly no remedy for the countless numbers of people who will be arrested and searched in the meantime.

Interrelated with petitioner's suggestion that the availability of a declaratory judgment action is a sufficient alternative to suppression, is petitioner's argument that this Court should hold that the Henderson ordinance is unconstitutional, and yet not suppress the evidence. (Petitioner's Brief, pp. 37-39). In effect, petitioner seeks to change respondent's habeas corpus action into an action for a mere declaratory judgment. In addition to violating both the Declaratory Judgment Act and Article III of the Constitution, this course of action would be inconsistent with a long line of this Court's precedent.

In order for the Court to declare this ordinance unconstitutional, there must be a case or controversy concerning the constitutionality of the ordinance within the meaning of Article III of the Constitution. The Court recently had occasion to explain the scope of this requirement in the context of a declaratory judgment action seeking to void a loitering ordinance. *Ellis v. Dyson, supra*. In *Ellis* plaintiffs had been arrested and prosecuted under the Dallas, Texas vagrancy ordinance.



They did not appeal their conviction, which became final, but they did seek a declaratory judgment that the ordinance was unconstitutional on grounds similar to those urged in the present case. The Court held that "a genuine threat [of prosecution] must be demonstrated if a case or controversy, within the meaning of Article III of the Constitution and of the Declaratory Judgment Act, may be said to exist . . . . Further, the credible threat must be shown to be alive at each stage of the litigation." *Id.* at 283 (Citations omitted). The Court observed that at oral argument counsel admitted not being in touch with their clients and not knowing their whereabouts. Then the Court stated that "if petitioners no longer frequent Dallas, it is most unlikely that a sufficiently genuine threat of prosecution for possible future violations of the Dallas ordinance could be established." *Id.* at 282.

The *Ellis* case not only underlines the illusory nature of the declaratory judgment action as a substitute for suppression, but it demonstrates the impropriety of declaring the Henderson ordinance unconstitutional without suppressing the evidence. From the time respondent was returned from Nevada to California for trial until the present, Henderson has expressed no desire to prosecute petitioner for vagrancy. On August 27, 1975 respondent was released from prison and now resides under parole supervision in Detroit, Michigan. There is virtually no chance of his ever being again subjected to the possibility of prosecution under the Henderson ordinance. Thus, unless the evidence is to be suppressed, respondent is indistinguishable from the plaintiffs in *Ellis*, and this Court is without power, under Article III, to declare the ordinance unconstitutional. It is the existence of the suppression doctrine that assures that this case will be presented in the concrete, adversary proceeding envisioned by the case

or controversy requirement. Consequently, petitioner's "alternative" to suppression is not only inadequate, it is non-existent. Until a better alternative is devised, even critics of the exclusionary rule concede that suppression is appropriate. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 420-21 (1971) (Burger, C.J., dissenting).

Petitioner's suggestion that the ordinance should be declared unconstitutional, but that the evidence should not be suppressed, is also contrary to the prior practice of this Court, supported by good policy, to give the fruits of his victory to the litigant who successfully challenges the constitutionality of a law authorizing searches and seizures. See *e.g., Berger v. New York, supra; Almeida-Sanchez, supra; Brignoni-Ponce, supra*. This has been so even though the Court's decision has not been applied retroactively. *Peltier, supra*. This practice is supported by sound policy, because nothing would stop the judicial development of constitutional law in general, and Fourth Amendment law in particular, more assuredly than changing a suppression hearing into a mere academic exercise. "Lawyers are meant to serve their clients, and they cannot at the same time serve the growth of the law if they know that time spent and emphasis expended on novel or potentially disruptive points of law are unlikely to advance their client's interests." *Gaither v. U.S.*, 413 F.2d 1061, 1085 (D.C. Cir. 1969). See also, *Hall v. United States*, 459 F.2d 831 (D.C. Cir. 1972). As Professor Oaks, no friend of the exclusionary rule, has observed

> "It is . . .imperative to have a *practical procedure* by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will

attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law. Over the long term this may integrate some Fourth Amendment ideals into the value system or norms of behavior of law enforcement agencies." Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 756 (1970). [Emphasis added]. See also Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 429-30 (1974).

**B. Evidence seized in violation of the Fifth Amendment right against self-incrimination must be suppressed.**

While it is clear that respondent was arrested in violation of the Fourth Amendment, and that suppression is appropriate for that reason alone, it is also true that petitioner's arrest was in violation of the Fifth and Fourteenth Amendments. It has long been true that evidence obtained in violation of the right against self-incrimination must be suppressed even though the evidence is reliable. *Lego v. Twomey*, 404 U.S. 553 (1972); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Jackson v. Denno*, 378 U.S. 368 (1964); *Brown v. Mississippi*, 297 U.S. 278 (1936); *Bram v. United States*, 168 U.S. 532 (1897). Even though the violation was made in "good faith," was authorized by the state law, and did not result in coerced testimony, the state must be deprived of the fruits of the violation.

In *Griffin v. California*, 380 U.S. 609 (1965), the California constitution authorized the prosecution to comment on a defendant's failure to take the stand, yet this Court reversed Griffin's conviction because the right



of the prosecution to comment violated the Fifth Amendment. Putting the defendant to the choice of either testifying or suffering adverse prosecutorial comment was an undue burden on the privilege because it made its assertion "costly." *Id.* at 614. For similar reason, this Court reversed a conviction when the state law required the defendant either to testify as the first defense witness or forego the opportunity to testify in his defense. *Brooks v. Tennessee*, 406 U.S. 605 (1972). Even though *Brooks* never testified, "the Tennessee rule imposed a penalty for petitioner's initial silence, and that penalty constitutes the infringement of the right." *Id.* at 611 n. 6.

In a like manner the Henderson ordinance imposed severe penalties for respondent's silence–arrest, search, incarceration and prosecution. Respondent was arrested because, in the officer's opinion, he had refused to answer the officer's questions. Thus, the arrest and search of respondent was a penalty exacted for respondent's assertion of the privilege, and the search, therefore, violated that privilege. *Brooks, supra*. It follows that the direct fruit of that search must be suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1963); *see Michigan v. Tucker*, 417 U.S. 433, 447, 451 (1974); *Orozco v. Texas*, 394 U.S. 324 (1969).

**C. Evidence seized pursuant to an arrest under an unconstitutionally vague law must be suppressed.**

Respondent's Fourteenth Amendment due process rights were also violated because he was arrested under an unconstitutionally vague law. The Henderson ordinance is

vague because it does not set up non-discretionary standards for enforcement, and because it fails to give the citizen adequate notice of what is considered criminal conduct. See Part III, *supra*; Note, *Recent Supreme Court Developments of the Vagueness Doctrine: Four Cases Involving the Vagueness Attack on Statutes During the 1972-73 Term*, 7 Conn. L. Rev. 94 (1974). Although the values protected by the Fourth and Fifth Amendments and the Fourteenth Amendment vagueness doctrine are not congruent, there is a substantial overlap. Suppression, therefore, is an appropriate remedy for a search pursuant to an arrest under a vague law.

People have a right to be free from unreasonable governmental intrusion with respect to their persons, houses, papers and effects (the Fourth Amendment) and the private enclaves of their minds (the Fifth Amendment). A vague criminal law trenches on the right to privacy exemplified by these two amendments in several ways. The failure to set up non-discretionary standards for enforcement directly violates the Fourth Amendment because it authorizes and encourages unreasonable arrests. (See Part III, *supra*). However, the Fourth and Fifth Amendments also evidence the broader policy that people have a right to be left alone in the lawful pursuit of their lives.[31] *Katz v. United States*, 389 U.S. 347 (1967). Criminal laws which fail to give adequate notice of the proscribed conduct frustrate this right to be left alone because no matter how conscientiously a citizen tries to hue his conduct to the proper standard, he will be frustrated because the standard is unclear. This frustration would be more than academic because the citizen would find his privacy repeatedly invaded by arrests for conduct he did not know was criminal. A code of criminal law which is kept a secret from the people would be anathema to our system of justice. A law which does not give fair notice of what is proscribed is little better.

[31] The policy of the Fifth Amendment is so strong that it applies even in the *unlawful* pursuit of one's life.



Since the values transgressed by a vague criminal law are closely akin to those protected by the Fourth and Fifth Amendments, the same remedy for a violation is appropriate. If the object of a vague law were conviction, this Court would have no hesitancy to set aside the conviction. *Smith v. Goguen*, 415 U.S. 566 (1974); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Palmer v. City of Euclid*, 402 U.S. 544 (1971). So, too, when the object of the law is arrest for the purpose of search and investigation, the appropriate remedy is to prevent the government from attaining its objective by suppressing the evidence.

It would make no more sense to declare the ordinance unconstitutional and yet permit use of the evidence seized, than it would to declare the ordinance unconstitutional and yet refuse to set aside a conviction under it. Legislators owe a duty to those who live under their laws adequately to inform them, and if depriving the government of the fruits of arrests under vague laws will deter the passage of such laws, then suppression is appropriate. Likewise, both the integrity of the Court and the Court's role in the judicial review of the constitutionality of legislation make it appropriate for this Court to deprive the government of the fruits of such legislation. Moreover, the case and controversy requirement of Article III would make it inappropriate for this Court to review the

constitutionality of the Henderson ordinance without also suppressing the evidence. (See Part VA, *supra*).

Simply put, the Henderson ordinance, and others like it,[32] constitute a frontal assault on the Fourth, Fifth and Fourteenth Amendments. While this law is merely the ordinance of a small town, it is being reviewed at a time when the public has genuine reason to fear that its government has acted with less than total respect for these fundamental rights. Unless these rights are to become no more than wishful thinking, this Court must make it clear that nothing is to be gained by violating them. There is simply no reasonable alternative to suppression of the evidence.[33]

## VI

## THE ARRESTING OFFICER DID NOT HAVE PROBABLE CAUSE TO BELIEVE THAT RESPONDENT HAD VIOLATED THE HENDERSON VAGRANCY ORDINANCE

The absence of probable cause to arrest respondent was briefed and argued both in the District Court and in

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[32] Nev. Rev. Stat. 30.040 (1973); Cal. Pen. Code §647(e).

[33] It is not possible, as it was in *Michigan v. Tucker*, 417 U.S. 433 (1974), to give respondent substantial relief by suppressing the direct fruits of the illegal arrest, and yet deny the motion to suppress with respect to more remote fruits. While this Court may well decide not to apply this case retroactively, that decision should await a subsequent case in which it is properly presented. *Michigan v. Tucker, supra*, at 452 n. 26.



the Ninth Circuit Court of Appeals. Since the Court of Appeals found the ordinance unconstitutional on its face, the Court did not reach the issue of the existence of probable cause. If this Court were to find that the ordinance is constitutional, or that suppression is not appropriate when an arrest is made under an unconstitutional ordinance, then the issue of the existence of probable cause must be addressed.[34]

At the outset it should be noted that this case involves an arrest and the search pursuant to the arrest. The search of respondent may be sustained only on the grounds that probable cause existed to believe that he had violated the Henderson vagrancy ordinance. Although this is not a "stop-and-frisk" case,[35] *Terry v. Ohio*, 392 U.S. 1 (1968) is instructive on the constitutional standard for full, custodial arrests.

There is a substantial difference in the degree of belief which an officer must entertain in order to make a limited *Terry* stop, and the degree necessary to justify a full custodial arrest. *Terry, supra*, 392 U.S. at 26-27. In both instances, it is essential that the police officer be "able to point to specific and articulable facts which,

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[34] The absence of probable cause is also the narrowest ground on which to suppress this evidence. In the absence of probable cause, the constitutionality of the ordinance would not have to be addressed. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

[35] Even if, under the reasonable suspicion standard of *Terry*, Officer Lattin had sufficient cause to stop respondent, the officer never expressed, nor do the facts suggest, a reasonable suspicion that respondent was armed. Consequently, no pat down or "frisk" would have been appropriate under *Terry*. Petitioner does not now contend, nor has petitioner contended, that this seizure could be justified as a protective search for weapons. See 507 F.2d at n.3.

taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Terry, supra*, at 21. The officer's judgment must be measured against an objective standard because "anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more than inarticulate hunches . . . ." *Terry, supra*, 392 U.S. at 22.

When the officer decides to arrest rather than merely to stop, he may do so only when "he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime." *Terry, supra*, 392 U.S. at 26; *Henry v. United States*, 361 U.S. 98, 102 (1959) (probable cause exists if "facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed); *Carroll v. United States*, 267 U.S. 132, 162 (1925). This higher standard is required because the intrusion on the privacy and liberty of the individual is vastly more severe in the case of arrest. The arrest "is the initial stage of a criminal prosecution" and it is "inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows," *Terry, supra*, 392 U.S. at 26. When measured against this standard, Officer Lattin was completely unjustified in arresting respondent for the crime of vagrancy as defined by the Henderson ordinance. The vagrancy ordinance is written in the conjunctive, and it has three basic elements, (See Part III, *supra*). Thus, in order to be guilty of vagrancy all three elements must be violated. For convenience, the absence of probable cause will be discussed with respect to each separate element.



**A. Officer Lattin did not have probable cause to believe that respondent was loitering or wandering from place to place without apparent reason or business.**

Officer Lattin observed respondent walking with a companion in an open shopping center during daylight business hours. There were many other people also walking in the shopping center. Respondent and his companion were walking quickly, and when Officer Lattin stopped respondent he was walking from the parking lot towards one of the department stores.

There is no evidence that respondent and Mr. Chaney were wandering aimlessly about because Officer Lattin's observation of respondent and Mr. Chaney lasted for only a very short time. Nor could it be said that they were walking up and down in a manner consistent with "casing" a store for a possible robbery. Compare *Terry, supra*, 392 U.S. at 23 (suspects walked past store, and peered in approximately 24 times). Since their manner of walking could be explained by any number of innocent reasons, their major sin seems to be that they "appeared" to look at the police cruiser several times. Any citizen, no matter how innocent, is likely to pay close attention to a uniformed policeman in a marked car who appears to be paying close attention to him. This is especially so if the police car makes a U-turn. Certainly, every citizen who looks at a police car and walks the other way is not subject to arrest.

Officer Lattin pulled his cruiser up behind Mr. Powell and honked his horn. Since Mr. Powell did not turn around, and had previously only "appeared" to look at the police car, he may not have known that it was the police car behind him. In any event, this ambiguous gesture on the part of the officer got an equally ambigu-

ous response–respondent kept walking towards the department store. When the officer alighted from his car and said "wait a minute," respondent stopped and turned around. He did not, as petitioner asserts (Petitioner's Brief, pp. 7, 53), fail to obey any command of the officer.

Since all of this transpired during daylight in a business area containing many people walking about, respondent's business was certainly as "apparent" as was every other shopper's. Indeed, respondent himself was probably more apparent, since respondent was dressed in an orange suit (App. 9).

Officer Lattin, therefore, did not have probable cause to believe that this portion of the ordinance had been violated.

**B. Officer Lattin did not have probable cause to believe that respondent had refused to identify himself and to account for his presence when requested to do so.**

When asked for identification, Mr. Powell said that it had been recently stolen. When asked for his name and birth date, Mr. Powell gave his true name and birth date. Officer Lattin checked the name through the Henderson police department and there were no "wants" for Mr. Powell. The officer testified that he had no reason to believe that the name and age were false other than his "own suspicious nature."

When he asked where he had been staying and for how long, he replied that he had been staying with friends in Las Vegas for a few days. He did not know their names or the address. When asked where he was going, he replied that he was going back to Michigan. Although Officer



Lattin thought that it was unreasonable in his opinion to go to Michigan via Henderson, he testified that one could go to Michigan via Henderson (App. 12), and he had no reason to doubt that respondent was going to Michigan (App. 13). Actually, it is more reasonable for a wintertime traveler to take the southern route (U.S. 66), and to do so he would pass by Henderson. (See n. 2, *supra*).

Mr. Powell was never asked why he was in the shopping center, or why he was going to Michigan via Henderson,[36] or why he was walking in the manner which gave rise to Officer Lattin's suspicions. Thus, having never been requested to account for his presence, he hardly could have been guilty of refusing to do so. He did not refuse to identify himself, nor did he refuse to tell the officer where he was going, and the officer testified that he had no reason to disbelieve the answers–other than his "own suspicious nature." Of course, the officer's suspicious nature is just the kind of "inarticulate hunch" which this Court held insufficient to sustain even a stop, much less a full custodial arrest. *Terry, supra*, at 22.

The only portion of the dialogue between Officer Lattin and respondent that could conceivably constitute a "refusal" to account for respondent's presence would be his inability to give the names and addresses of the friends he had been staying with in Las Vegas for the past few days. However, a requirement that one relate where he had been staying for the past few days in a different city can hardly be said to come fairly within the meaning

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[36] Henderson is a small gambling center near Las Vegas. It is also on the route to Boulder Dam, a world famous tourist attraction and vacation spot. Also, to reach U.S. 66 from Las Vegas one would pass by Henderson.

of a law requiring that one "account for his presence." The plain meaning of the "account" section of the ordinance is that one must respond with some explanation for his immediate presence and conduct.

Even if "account" could be fairly said to include a prior history spanning several days, respondent did not *refuse* to "account." He told Officer Lattin that he had been staying in Las Vegas for the past few days, but that he did not know the names and addresses of the people with whom he had stayed. While this inability may seem strange at first, it is not surprising given the class of those who are often arrested for vagrancy. *See Papachristou, supra*. In fact, at respondent's trial, the court asked one of the witnesses, Mr. Buckley, where he was staying so that he could be contacted if further testimony were required. The witness replied that he did not know the address of his present residence (Tr. 130).

Thus, Officer Lattin did not have probable cause to believe that respondent had refused to identify himself and account for his presence.

**C. Officer Lattin did not have probable cause to believe that the surrounding circumstances were such as to indicate to a reasonable man that the public safety demanded the identification of respondent.**

As discussed *supra*, this clause is perhaps the most clearly violative of the Fourth Amendment because it criminalizes the status of being a suspicious person, thus allowing full custodial arrest and prosecution for what, under *Terry*, would at most be sufficient to justify a brief stop and limited inquiry. It is also a difficult clause to



interpret in the context of probable cause, because apparently one must ask whether the officer had probable cause to believe that a reasonable man would have had reasonable suspicion that respondent had been or was about to engage in some undefined criminal conduct. Nevertheless, even applying this standard, the arrest of respondent was unjustified.

Officer Lattin had no reports of suspicious prowlers, nor was he patrolling in a high crime area. He did not testify that any crimes had recently been committed in the area. He did not know anything of the shooting in California, nor did he know respondent, respondent's reputation, or respondent's companion. See *U.S. v. Harris*, 403 U.S. 573 (1971). Respondent was not abroad at an unusual hour or in an unusual place. See *People v. Caylor*, 6 Cal. App.3d 51, 85 Cal. Rptr. 497 (1970); *People v. Weger*, 251 Cal. App.2d 584, 59 Cal. Rptr. 661 (1967). He and his companion were walking in an open shopping center where one would expect to see people walking about. In addition, since respondent was dressed in conspicuous attire, it is unlikely that he was about to engage in some clandestine activity.

Thus, the only conduct on which Officer Lattin could rely to justify this arrest was the manner in which respondent and his companion were walking and "apparently" looking at the police car. Respondent neither took flight upon the appearance of the officer, nor did he manifestly appear to attempt to conceal himself.[37] Of-

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[37] The ALI's Model Penal Code, Proposed Official Draft Section 205.6 (1962), a more narrowly drawn law than the Henderson ordinance, specifies that flight or a manifest attempt to hide are among the considerations the officer may take into account in deciding whether the circumstances "warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or

ficer Lattin, because of his "suspicious nature," interpreted the manner in which respondent and Mr. Chaney were walking as possibly being motivated by some unidentifiable sinister purpose. Inexplicably, however, Officer Lattin never asked respondent why he was walking in the shopping center. Apparently, rather than give respondent an opportunity to explain the conduct which gave rise to the officer's suspicions, Officer Lattin preferred to substitute his own interpretation of respondent's based on the officer's own "suspicious nature."

Unless the requirement for specific, articulable facts is to be abandoned, an officer may not be permitted to assume a sinister purpose underlies otherwise innocent conduct. To do so would be to abandon the security of every citizen to the "inartuculate hunches," "volatile or inventive imagination," or "suspicious nature" of the police. *Terry, supra*, 392 U.S. at 22, 28. This Court has consistently refused to do so. *Terry, supra*, at 21, 22; *Brignoni-Ponce, supra*. Officer Lattin, therefore, did not have sufficient reasonable suspicion to justify a brief stop, much less sufficient probable cause to justify a full custodial arrest of respondent.

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property in the vicinity." Where adopted, this law has had mixed reviews. *Compare City of Portland v. White*, 9 Ore. App. 239, 495 P.2d 778 (1972) (unconstitutional), *with State v. Ecker*, 17 Crim. L. Rep. 2001 (constitutional if narrowly construed).



## VII

## THE SCOPE OF FEDERAL HABEAS CORPUS JURISDICTION PROPERLY INCLUDES THE SEARCH AND SEIZURE CLAIMS OF STATE COURT PRISONERS

Petitioner urges this Court to abandon its holding in *Kaufman v. United States*, 394 U.S. 217 (1969), and deny to state prisoners the use of federal habeas corpus as a means to have their Fourth Amendment claims reviewed in federal court. This Court has consistently taken jurisdiction over such cases, thus affirming that search and seizure claims are within the proper scope of habeas corpus. See *e.g., Warden v. Hayden*, 387 U.S. 294 (1967); *Carafas v. LaValle*, 391 U.S. 234 (1968); *Mancusie v. DeForte*, 392 U.S. 364 (1968); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *Lefkowitz v. Newsome*, ___ U.S. ___, 43 L. Ed.2d 196 (1975). The argument goes that to permit search and seizure claims to be raised on federal habeas corpus is contrary to the public interest. Petitioner bases this contention on the questionable premise that the benefits afforded society and the state prisoner by the remedy do not justify certain resulting costs.

Petitioner ignores completely what ought indeed to be the fundamental question: Is the scope of habeas corpus as it exists today that which is intended by Congress? It is properly the function of Congress to determine the limitations to be applied to the writ, and its legislative purpose should be respected, not frustrated. Furthermore, the policy arguments advanced in support of

limiting the writ, particularly finality considerations, while not without merit as applied to federal prisoners,[38] are considerably weakened in the case of the state prisoner raising federal constitutional claims. These arguments will be considered in turn.

**A. The present scope of federal habeas corpus jurisdiction, over search and seizure claims, comports with the intent of congress as embodied in §2254, and any modification of this jurisdiction is properly a legislative function.**

Historical data indicates that the Habeas Corpus Act of 1967 was intended by Congress to extend federal habeas corpus power to the greatest possible extent. See *Fay v. Noia*, 372 U.S. 391, 415-17 (1963); *Townsend v. Sain*, 372 U.S. 293, 311-12 (1963), *Ex Parte McCardle*, 73 U.S. 318, 325-26 (1868). The language of the Act is very broad in providing that the federal courts

> "... shall have power to grant writs of habeas corpus *in all cases* where *any person* may be restrained of his or her liberty *in violation of the constitution* or of any treaty or law of the United States. ..." Act of February 5, 1867, ch. 28, 1, 14 Stat. 385. (emphasis added).

The purpose of Congress in enacting the statute was to create a remedy independent of, both in its existence and its exercise, direct appellate review. This jurisdictional

[38] *Kaufman v. United States, supra*, involved a *federal* prisoner seeking federal habeas corpus. The Solicitor General in *Kaufman* conceded that habeas corpus should be available to review state prisoners' claims and agreed only that it should be unavailable to federal prisoners.



grant is virtually unrestricted, and it has remained so for over 100 years.

Although the courts at the outset, influenced by traditional notions of habeas corpus (*Developments in the Law–Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1049-50 (1970) (hereinafter cited as *Developments*)), viewed the writ as narrow in its scope (Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. Pa. L. Rev. 461, 465-66 (1966)), its development since that time has been characterized by a continual expansion of cognizable issues. Cf. *Ex Parte Siebold*, 100 U.S. 371 (1879) (constitutionality of statute could be considered on habeas corpus); *Frank v. Mangum*, 237 U.S. 309 (1915) (due process claim cognizable on habeas corpus); *Moore v. Dempsey*, 261 U.S. 86 (1923) (federal claims previously considered by state judiciary properly redetermined by federal habeas judge); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (federal habeas proceedings proper to consider claim of denial of counsel); *Waley v. Johnston*, 316 U.S. 101 (1962) (writ available to consider constitutional claims as well as questions of jurisdiction).

This expansion was fully compatible with the legislative intent in passing the Act. The 1867 Act was only one of a series of federal statutory and constitutional changes expanding federal jurisdiction after the Civil War. It was a time when "nationalism dominated political thought and brought with it congressional investiture of the federal judiciary with enormously increased powers." *Zwickler v. Koota*, 389 U.S. 241, 246 (1967); Tushnet, *"Judicial Revision of the Habeas Corpus Statutes: A Note on Schneckloth v. Bustamonte,"* 1975 Wisc. L. Rev. 484, 489-91. Thus, only one year after enacting the Habeas Corpus Act of 1867, the Fourteenth Amendment was

adopted. The Civil Rights Act of 1871 was adopted, as was the Judiciary Act of 1875 giving federal courts general federal-question jurisdiction. Numerous removal statutes were also adopted between 1863 and 1866. A. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. of Pa. L. Rev. 793, 829 (1965). The pre-war policy of looking to state courts for vindication of federal rights was completely altered by Congress. *Steffel v. Thompson*, 415 U.S. 452, 464 (1974); *Zwickler v. Koota, supra*. Congress even went so far as to modify the long standing rule against federal court interference with pending state proceedings (see 28 U.S.C. §2283) by adopting the 1871 Civil Rights Act (42 U.S.C. §1983). *Mitchum v. Foster*, 407 U.S. 225 (1972).

Against this background, it is not surprising that Congress wedded the scope of habeas corpus to the Constitution. Congress was in an expansive mood and painted with a broad brush. The legislative history of the Act supports the broadest jurisdiction (Tushnet, *op. cit. supra*, 1975 Wisc. L. Rev. at 489-91), and in interpreting the new Act, this Court in *Ex parte McCardle*, 73 U.S. 318, 325-26 (1868), decided only one year after the Act's adoption, stated:

> This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties or laws. It is impossible to widen this jurisdiction.

Thus, federal habeas corpus jurisdiction, like general federal-question jurisdiction, was made a function of the Constitution, treaties and laws of the United States. And



habeas corpus, like federal-question jurisdiction, was free to vary with the growth of the federal rights of those charged with crimes in state courts. See Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 20 (1956). The expansion of due process rights led naturally to a corresponding expansion of habeas corpus to vindicate those rights. Habeas corpus thus evolved as a means to assure compliance by the states with the constitutional notion of due process.

Those who argue that federal habeas corpus is now different in scope and function from what habeas corpus was in 1867 miss this essential point: The scope of the writ cannot be artificially crystallized and frozen out of the stream of time (Sokol, *Federal Habeas Corpus*, pp. 19-20 (2d. Ed. 1969). It would make no more sense to limit federal habeas corpus in light of its 1867 scope than it would to restrict federal-question jurisdiction to only those federal causes recognized at the time of its adoption in 1875. The writ has never been

> "... a static narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

Once it is determined by this Court that a particular constitutional right must be recognized by the states, then the failure to recognize that right in a state process brings a convicted person within the ambit of the 1867 Act.

If there was any doubt regarding the scope of the writ, it was dispelled by the Court's decision over 20 years ago in *Brown v. Allen*, 344 U.S. 443 (1953). The court in *Brown* held that all federal constitutional questions raised by state prisoners were reviewable on federal habeas

corpus. The federal judge must independently apply the correct constitutional standard to the facts underlying a constitutional claim, no matter how fairly and completely the claim has been litigated in the state courts:

> "... The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right..." *Brown v. Allen, supra*, 344 U.S. at 508 (Frankfurter, J., concurring).

Implicit in the opinion was a recognition that habeas corpus provides a procedural device through which federal rights are vindicated and state enforcement of those rights is supervised. See *Developments, supra*, at 1061-62. This Court thus confirmed the mandate of the statute and established an unequivocally broad role for the federal habeas jurisdiction.

The Court in *Fay v. Noia*, 372 U.S. 391 (1963), went further and recognized habeas corpus as an established procedure which provides a remedy for any restraint considered to be contrary to fundamental rights. Thus as due process rights evolved and expanded, the writ became available as a remedy for the violation of those rights. While the Court in *Fay* did not expressly rule that Fourth Amendment claims would be cognizable in federal habeas corpus proceedings, the underlying rationale was that habeas was properly available as a remedy for any violation of due process. At the time of the *Fay* decision, this Court had already applied the exclusionary rule to the states. *Mapp v. Ohio*, 367 U.S. 643 (1961). Subsequent cases made it clear that a state prisoner's Fourth Amendment claims could indeed be heard in federal habeas corpus proceedings. *See e.g., Carafas v. LaVallee*, 391 U.S. 234 (1968); *Warden v. Hayden*, 387 U.S. 294 (1967).



Given the breadth of *Brown* and *Fay* together with the holding in *Mapp*, it was natural that the number of habeas corpus petitions would expand accordingly. As Congress was fully aware, in fiscal 1963, 1,692 applications were filed by state court prisoners; in 1964; 3,248 applications were filed; and in 1965, 4,845 applications were filed. (1966 Director of Administrative Office of the United States Courts Annual Report Table, S. Rep. No. 1797, 89th Cong., 2d Sess. 10 (1966)). In response to this growing number of habeas corpus applications in the federal courts, Congress, in 1966, amended the habeas corpus statute to expedite the disposition of these applications by state court prisoners. (28 U.S.C. §2254(d) (Supp. IV, 1969), amending 28 U.S.C. §2254 (1964)).

Congress was surely aware at the time it amended the statute that of the growing number of petitions, many were based on Fourth Amendment claims. *See e.g., Hall v. Warden*, 313 F.2d 483 (4th Cir. 1963); *U.S. ex rel. Linkletter v. Walker*, 323 F.2d 11 (5th Cir. 1963), *aff'd* 381 U.S. 618 (1965); *California v. Hurst*, 325 F.2d 891 (9th Cir. 1963); *U.S. ex rel. Anglet v. Fay*, 33 F.2d 12 (2d Cir. 1964); *Sisck v. Lane*, 331 F.2d 235 (7th Cir. 1964); *Hubbard v. Tinsley*, 336 F.2d 854 (10th Cir. 1964); *Burnside v. Nebraska*, 346 F.2d 88 (8th Cir. 1965). Evan Bator's article (Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963) (hereinafter cited as Bator)) was three years old, and the arguments for limiting Fourth Amendment claims on habeas corpus were well known. Nevertheless, rather than placing any limitation on writs of this particular nature, Congress instead sought to decrease the number in their totality, and to expedite the disposition of those filed, through a qualified application of the doctrine of res judicata. By according a

presumption of correctness to factual determinations made by state courts and fixing on the petitioner the burden of proof as to certain factual issues, Congress contemplated the elimination of a substantial number of nonmeritorious and repetitious applications. S. Rep. No. 1797, 89th Cong., 2d Sess. 10 (1966) (Report of the Committee on Habeas Corpus, Judicial Conference of the United States, Sept. 1965). A state court suppression hearing is exactly the kind of hearing to which the federal court would defer under the amended Section 2254.

Thus Congress, by requiring exhaustion of available state remedies and according a limited res judicata effect to state court hearings, struck a balance between the autonomy of the state courts and the finality of their decisions on the one hand, and the acknowledged right of the federal courts on the other to review constitutional questions on habeas corpus.[39] Had it desired to limit the scope of federal review in light of *Brown, Mapp*, and the numerous Circuit Court of Appeals decisions allowing Fourth Amendment claims to be raised, Congress would have undoubtedly done so. Rather, the objective of the amendment was to reaffirm the role of habeas corpus as a proper vehicle for federal review. Through the elimination of frivolous applications, a proper focus on those applications deserving consideration is promoted. Furthermore, the legislation was intended as a strong inducement to the state courts to safeguard the constitutional rights of defendants. *Id*. The Amendment provides that if

[39] Earlier federal review of state court prosecutions is barred by considerations of comity and federalism. *Compare Dombrowski v. Pfister*, 380 U.S. 479 (1965) *with Younger v. Harris*, 401 37 (1971). *See* 28 U.S.C. §2283; *Mitchum v. Foster*, 407 U.S. 225 (1972).



the state proceeding was deficient in any one of eight respects, the presumption of correctness is eliminated. The violation of due process is one of these criteria, thus evidencing the intention of Congress to include all constitutional claims within the ambit of Section 2254.

Congress has had several opportunities to consider limitations on habeas corpus jurisdiction, but has consistently refused to do so. All of the arguments for limiting the writ were pressed on Congress in 1956, when a bill to limit habeas to cases where the state had not granted the defendant an adequate opportunity to litigate the issue was under consideration. That legislation failed to pass. *See* Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 Yale L. J. 50, 51 57 (1956). Similar legislation was proposed in 1958 and again in 1959, but on both occasions was rejected. Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. Pa. L. Rev. 461, 523 (1966).

Again, in 1971 Mr. Justice Rehnquist, then Assistant Attorney General representing the Department of Justice, ably pressed petitioner's arguments on Congress when he gave testimony before the Subcommittee on Constitutional Rights with respect to S. 895, 92d Cong., 1st Sess. (1971). Hearing, Sept. 14, 1971. Modification of the exclusionary rule by adoption of some alternative method of enforcing it was suggested. *Id*. at 97. It was urged that the writ should be confined to issues that go to guilt or innocence, thus eliminating Fourth Amendment claims. *Id*. at 97-104. Both Professor Bator's and Professor Oaks' articles were pressed on the committee. *Id*. at 99, 103. This Court's decision in *Whitely v. Warden*, 401 U.S. 560 (1971) was cited as the most recent example of the kind of case which should be

removed from the ambit of federal habeas corpus. *Id.* at 99-100. Present habeas corpus practice was said to be unwise because it involved too much federal judge time (10,892 filings in 1970). *Id.* at 101. Although the Department of Justice did not urge that the writ "be restricted to the role it played at the time of the adoption of our Constitution," the expansion of the reach of the writ was noted as a reason for Congress to restrict its scope. *Id.* at 100-01. It was urged that the state's interest in finality, and the lessened deterrent impact of a ruling coming a number of years after the search also justified modifying the scope of habeas corpus in Fourth Amendment cases. *Id.* at 98, 103. In spite of these arguments, Congress again declined to modify the existing scope of habeas corpus.

In 1973, legislation which reflects the opinion of Justice Powell in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (Powell, J., concurring), was again introduced to the 93rd Congress. *See* Comment, *Proposed Modification of Federal Habeas Corpus for State Prisoners–Reform or Revocation*, 61 Geo. L. J. 1221 (1973). Despite the arguments made for limiting the writ, Congress has rejected every opportunity to do so. Under accepted standards of statutory court construction judicial acceptance of federal habeas jurisdiction in search and seizure cases together with Congress' failure to reject this reasonable interpretation of the wording of §2254, establishes beyond doubt that jurisdiction in such cases is proper. *Blue Chip Stamps v. Manor Drug Stores*, ___U.S. ___, 44 L. Ed.2d, 547-48 (1975).



**B. The advantages of Federal habeas corpus as a means of protecting the fourth amendment rights of prisoners outweigh any countervailing interests in the finality of state court judgments**

Petitioner argues that society's interest in the finality of litigation is such that application of the exclusionary rule ought to be abolished within the context of federal habeas corpus for state prisoners. Congress itself contemplated a greater degree of finality when it passed the 1966 amendments (S. Rep. No. 1797, 89th Cong., 2d Sess. 10 (1966)), yet sought to implement this desire by limiting federal review of factual issues while doing nothing to restrict the scope of habeas corpus as a procedural safeguard. There is no greater need for finality today than existed in 1966 when Congress acted.

In the case of the federal prisoner, there may be merit to the finality argument as advanced by petitioner. This Court in *Kaufman* refused to distinguish federal prisoners from state prisoners on the grounds that the federal prisoner will always have had an opportunity to raise his claim in a federal court. The Court made clear that all constitutional claims are cognizable in a §2255 (28 U.S.C. §2255) proceeding brought by a federal prisoner, just as *Brown* has indicated that habeas corpus is unrestricted as to the constitutional questions which can be raised by state prisoners. However, some commentators have criticized this aspect of habeas corpus as unnecessarily providing the federal prisoner with a duplication of opportunities within the same system. See Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378 (1964); *cf.* Bator, *supra*, at 518. It can be argued that once he has obtained direct review in a

federal Court of Appeals, the requirements of a separate proceeding in a federal forum are satisfied.

Regardless of the merit of these arguments as applied to the federal prisoner, the state prisoner is clearly in a much different position. State prisoners, unlike federal prisoners, may not have the opportunity to have a federal court review their federal constititional claims until a writ for federal habeas corpus has been filed. The ultimate right of a state criminal defendant to have a federal court and federal judges pass upon his federal contentions cannot be secured solely by the Supreme Court's power to review state judgments. The structure of this Court's *certiorari* jurisdiction is incapable of providing adequate protection, both because the sheer volume of cases precludes consideration of the claim of every state prisoner whose constitutional rights have been violated, and because this Court will not hear a case merely because it believes that case may have been erroneously decided. See *Bator, supra,* at 513; Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. Pa. L. Rev. 461, 464 (1966). These factors combine to prevent access to *certiorari* from being a "normal appellate channel in any sense comparable to the writ of error." *Fay v. Noia, supra,* at 436. See also Hart, *Foreword: The Time Chart of the Justices, The Supreme Court: 1958 Term,* 73 Harv. L. Rev. 84 (1959).

Given this practical impossibility, state prisoner claims regarding federal constitutional protections, including Fourth Amendment protections, can only be subjected to systematic federal court review through the use of federal habeas corpus. Indeed, without access to federal habeas corpus, it is unlikely that Mr. Powell would ever have had an opportunity to challenge the constitutionality of the search pursuant to Henderson's vagrancy statute in a



federal court. Until respondent's case, this Court had not considered these issues either "certworthy" or "appealworthy." In *Lefkowitz v. Newsome,* __ U.S. __, 43 L. Ed.2d 200 (1975) this Court granted *certiorari* on the issue of the appropriateness of federal habeas corpus, but declined to grant certiorari on the issue of the constitutionality of the vagrancy law under which the evidence had been suppressed. See also, *People v. Berk*, 32 N.Y.2d 567, 300 N.E.2d 411, *cert. denied*, 414 U.S. 1093 (1973); *People v. Solomon*, 33 Cal. App.3d 429, 108 Cal. Rptr. 867 (1973), *cert. denied*, 414 U.S. 951 (1974) (identical California statute); *People v. Weger*, 251 Cal. App.2d 584, 59 Cal. Rptr. 661 (1967), *cert. denied*, 389 U.S. 1047 (1968) (identical California statute).

Petitioner cites an article by Professor Amsterdam as authority for the argument that finality considerations warrant the denial of habeas in cases such as the one presently before the Court. Brief for the Petitioner, pp. 42-43. The quoted section is misleading, however, in that petitioner fails to note that Professor Amsterdam was specifically addressing himself to the problems of collateral relief for federal prisoners. The issue at hand is an entirely different one. Professor Amsterdam himself states in the introduction in his article that one must distinguish at the outset the problem of federal habeas corpus for state prisoners:

> ". . . there are substantial justifications for federal district court litigation or relitigation of federal contentions invoked in bar of a state criminal conviction. Volume of cases and inadequate state procedures make reliance on the Supreme Court unsatisfactory here; the Court is not properly a routine enforcement agency; in any event, . . . *it makes good sense to give a state criminal defendant a federal judge to try the facts underlying his federal*

*constitutional claim*." Amsterdam, *Search, Seizure, and Section 2255*, 112 U. Pa. L. Rev. 378, 379-80 (1964) (emphasis added).

Amsterdam goes on to note specifically that federal habeas corpus lies to review a state prisoner's claim based on *Mapp. Id.* at 380, fn. 13.

In his concurring opinion in *Schneckloth*, Justice Powell quotes Professor Amsterdam in support of the argument that finality interests warrant the limitation of the writ

> "Professor Amsterdam has noted that 'for reasons which are common to all search and seizure claims,' he 'would hold even a slight finality interest sufficient to deny the collateral remedy.' " *Schneckloth v. Bustamonte, supra,* at 262 (quoting Amsterdam, *supra*, at 388).

It should be noted, however, that Professor Amsterdam goes on to state:

> "In the case of federal habeas for state prisoners, the total impact of the finality considerations as they operate uniquely upon each habeas corpus case is a part of the gross price which the federal system pays under *Brown v. Allen* to give the prisoner his federal judge. The price is high, no doubt, but the stakes are also high for the prisoner, and the alternatives–leaving federal "fact," together with much of federal "law," to the state trier; establishing federal removal jurisdiction over state criminal cases involving federal defensive claims–seem no less unsatisfactory." Amsterdam, *supra*, at 385, fn. 33.

It is clear that the concern of Professor Amsterdam for finality does not apply as forcefully to federal habeas corpus for state prisoners as it does to the problem of collateral relief for federal prisoners. But see, *Schneckloth v. Bustamonte*, 412 U.S. at 272, fn. 16 (Powell, J., concurring).



The argument to limit the scope of the writ in the interest of finality seems to ignore the important functions which the federal courts perform. First, providing a separate federal forum isolated from state procedures permits a proper focus on the constitutional questions involved in a given case. There is substantial justification for such a dispassionate second look, since the proximity of state judges to the enforcement of state substantive law may cause them to focus primarily on ensuring that the guilty are punished and seeing that society is protected by their detention. Such concerns may unconsciously affect their disposition of the constitutional claims. See *Developments, supra,* at 1057-61; Note, *Federal Habeas Corpus for State Prisoners and the Fourth Amendment*, 52 N. Car. L. Rev. 633, 641-42 (1974).

Moreover, providing a federal forum creates a greater likelihood of uniform application of federal constitutional law in all state court determinations. *Id., Development* at 1057-61. This is entirely proper, for Congress has designated district courts, in light of the Supremacy Clause of the Constitution, to entertain post-conviction claims based on the misapplication of federal law by state courts:

> "The fact that Congress has authorized district courts to be the organ of higher law rather than a Court of Appeals, or exclusively this Court, does not mean that it allows a lower court to overrule a higher court. It merely expresses the choice of Congress how the superior authority of federal law should be asserted." *Brown v. Allen, supra,* 344 U.S. at 510.

Certainly the several states are sovereign entities and are not simply compartments of a central government. Undoubtedly many state judges and prosecutors are

irritated by the intrusion of federal law and federal courts into state criminal procedure. Theoretically, state courts are charged with the same responsibility as the federal courts for the application of federal law. But in actual practice, there are numerous instances of a woeful disregard for federal law in state court proceedings. (See American Civil Liberties Union's Amicus Brief for Respondent, pp. 18-27). If federal rights are to be adequately enforced, there must exist sanctions for their breach. As previously discussed, reliance upon direct review by the Supreme Court as the exclusive means of enforcement would be illusory. To the extent that the federal forum is closed to state prisoners, there is certain to be a marked dimunition in the meaningfulness of those rights which the Constitution guarantees.

Petitioner maintains that whatever deterrent function the exclusionary rule may serve when applied on trial and appeal becomes greatly reduced on collateral review. This argument fails to recognize that the purpose of the exclusionary rule is general deterrence. Its function is not to punish the erring officer, but to ensure that impermissible conduct will be forcefully discouraged through its threatening sanctions. The removal of federal habeas corpus jurisdiction would necessarily emasculate the rule. Police would reasonably foresee the resolution of search and seizure issues primarily by state trial judges "inclined unduly to reflect in their decisions the substantive goals of the state criminal law, primarily focusing on ensuring that the guilty are punished and on protecting society by their detention." *Developments, supra,* at 1061. Thus the deterrent effect of the sanction would be weakened with the police perception that search and seizure questions would be resolved in a friendly forum. See Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U.



Chi. L. Rev. 665, 724-25 (1970). Also, elimination of federal habeas corpus would be read as a sign that the Fourth Amendment is in disfavor, thus further encouraging police and legislatures to attempt further inroads into the values protected by the Amendment.

It should also be recognized that the exclusionary rule is directed not only at illegal police conduct, but also at the violation of constitutional liberties by the entire criminal justice system. Apart from any deterrent effect on questionable police practices, the exclusionary rule occasions judicial review of and lends credibility to constitutional guarantees, thus demonstrating that serious consequences attach to violation of constitutional rights.

> "The availability of post-conviction relief serves significantly to secure the integrity of proceedings at trial and on appeal . . . . Thus collateral relief, . . . contributes to the present vitality of all constitutional rights whether or not they bear on the integrity of the fact-finding process." *Kaufman v. United States*, 394 U.S. 217, 228-29 (1969).

Unconstitutional statutes are not shielded from the rule's impact. Unless legislatures are deterred from enacting, or allowing to remain, statutes like the one under the authority of which Mr. Powell was arrested, the legislative process in effect becomes a vehicle for illegal police searches and seizures, and judicial integrity is tarnished in the implementing process.

It is speculative to suggest that allowing state court prisoners to seek habeas corpus relief has an adverse effect on the rehabilitative process. Certainly the effect is no more adverse than allowing the prisoner to pursue any other type of post-conviction relief. Indeed the therapeutic effect of working within the system to defend due process rights may be great. Certainly respondent's ef-

forts in this regard have not hindered his rehabilitation–he has been released and is now on parole.

The argument that the present scope of federal habeas corpus places an unduly heavy burden on the federal courts and is an unwise allocation of judicial resources is unconvincing. Although there has been a substantial increase in the number of petitions over the past twenty years (*Schneckloth v. Bustamonte, supra,* 412 U.S. at 260, fn. 14 (Powell, J., concurring)), federal courts allocate relatively little time to habeas corpus petitions. Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners–Reform or Revocation*?, 61 Geo. L. J. 1221, 1246 (1973)) and only rarely require extensive evidentiary hearings since most of the petitions are decided at the pleading stage (LaFrance, *Federal Habeas Corpus and State Prisoners: Who's Responsible*?, 58 A.B.A.J. 610, 612 (1972). The vast majority of prisoners are unsuccessful, and only a small number of state retrials are required; at the time of the *Schneckloth* decision, statistics indicated that in about ninety-six percent of the prisoner petition cases the relief prayed for was not granted. *1971 Director of Administrative Office of the United States Courts Annual Report 132.*

In the absence of any statistics with respect to how many habeas corpus filings involve only Fourth Amendment issues, it is pure speculation that elimination of them would substantially diminish the case loads of federal judges. In addition, many of the Fourth Amendment habeas writs are easily disposed of. Even assuming that the prisoner has exhausted his available state remedies and is properly in the federal court, many of the writs involved claims of Fourth Amendment violations under recent cases of this Court. Since new search and seizure rulings are seldom retroactive, if the search anti-



dated the applicable case, the writ is dismissed on those grounds. In the event that the search post-dated the applicable law, if the state held a full hearing, then the federal judge would defer to the state hearing and decide only as a matter of law whether the search violated the Fourth Amendment. If the state court has failed to hold a full and fair hearing, the federal judge may consider retaining jurisdiction in the case while affording the state court the opportunity to hold a hearing. *See Sieling v. Eyman*, 478 F.2d 211, 215 (9th Cir. 1973) (writ granted unless within appropriate time the state held a hearing on petitioner's competency to stand trial). Thus, it is doubtful whether eliminating Fourth Amendment claims from habeas corpus jurisdiction would have any substantial impact on federal judge's workload. Certainly, if this Court is going to repeal Congress' jurisdictional statutes, diversity jurisdiction is a far better candidate than habeas jurisdiction. *See* Wulf, "*Limiting Prisoner Access to Habeas Corpus–Assault on the Great Writ*," 40 Brooklyn L. Rev. 253, 272 (1973).

Certainly there is an interest in finality arising from the added costs of continuing the legal process, but it is submitted that the approach of Congress in amending §2254 is more satisfactory than any limitation on the writ proposed by petitioner. Cost considerations seem an unpersuasive justification for limiting collateral vindication of constitutional claims, for the interest in preventing unlawful government action which impairs individual rights can hardly be measured in monetary terms.

The suggestion has been made that federal courts should not hear search and seizure claims on habeas corpus because such claims are not based on the guilt or innocence of the state prisoner. *Schneckloth v. Bustamonte*, 412 U.S. 218, 256-58 (1973) (Powell, J., con-

curring). This assertion ignores the historic role of habeas corpus. Since 1867 the writ has involved more than the question of innocence, its principle role being a means to vindicate due process rights and to assure that these rights will be adequately enforced by the states. *See, e.g., Fay v. Noia,* 372 U.S. 391, 402 (1963); Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 Yale L. J. 895, 895-96, 958-85 (1966); Note, *Federal Habeas Corpus for State Prisoners and the Fourth Amendment*, 52 N. Car. L. Rev. 633, 639 (1974). It has already been established that the expansion of grounds for federal habeas corpus has quite properly corresponded to the evolving standards of due process. Yet, it is argued that under this the federal courts should be limited solely to the examination of the trial record in order to determine "whether the petitioner was provided a fair opportunity to raise and have adjudicated the question in state courts." *Schneckloth v. Bustamonte, supra,* 412 U.S. at 250.

If this "fair opportunity" standard were adopted any reduction in the federal court caseload would be minimal. Federal courts would still be required to examine the record in order to determine whether the state court prisoner was afforded a fair opportunity to have his federal claims adjudicated. Friction would be increased, for a finding that a state court erred in the determination is not nearly as disparaging as would be a finding that a state court did not grant a fair hearing. Furthermore, in cases such as this where the California Court of Appeal, in an unpublished opinion, avoided resolving the constitutionality of petitioner's arrest and search by a clearly erroneous application of the harmless error rule in *Chapman v. California*, 386 U.S. 18 (1967), it would be extremely difficult to conclude whether or not a fair



hearing on the constitutional question was afforded (the opinion of the Court of Appeal is attached on Appendix C to the petition for writ of certiorari).

Only last term, this Court recognized the right of a state prisoner to raise a Fourth Amendment claim on federal habeas corpus though his conviction was based on a guilty plea. *Lefkowitz v. Newsome,* __ U.S. __, 43 L. Ed.2d 196 (1975). Under a relatively unique New York Law (NY Penal Law §220.05, now §220.03), a defendant could properly enter a guilty plea and still preserve his constitutional claims asserted in a motion to suppress. Despite his well-counseled admission of guilt, this Court held that Mr. Newsome had not waived his search and seizure claims for federal habeas corpus purposes. Three Justices argued, for the reasons stated in *Schneckloth*, that the voluntary confession of guilt should have precluded any consideration of the claims on habeas corpus. *Lefkowitz v. Newsome, supra,* __ U.S. __, 43 L. Ed.2d at 209-20. (Powell, J., joined by Burger, C. J. and Rehnquist, J., dissenting). The remaining members of the Court, however, refused to adopt this view, the majority maintaining that where a guilty plea did not constitute a forfeiture of the right to judicial review of search and seizure claims in the state court, such issues could be considered on federal habeas corpus. *Id.* at 203.

California, like New York, permits a defendant to appeal specified adverse pretrial rulings even though he subsequently pleads guilty. Cal. Penal Code §1538.5(m); *Lefkowitz v. Newsome, supra,* __ U.S. __, L. Ed.2d at 201 n. 3. If this Court were to adopt the position in *Schneckloth*, the untenable result would be that only those prisoners who pleaded guilty at trial could have their search and seizure claims reviewed on federal habeas corpus. The prisoner who, like Mr. Powell, when to trial maintaining his

innocence and pursued his claims through all available levels of state appellate review, would nevertheless be foreclosed from review of his constitutional claims in a federal forum. Yet California and New York prisoners who pleaded guilty might reasonably anticipate judicial review of the merits of the alleged Fourth Amendment violation on habeas corpus. There is nothing in either the Fourth Amendment or §2254 to support such an anomalous result.

Moreover, it is quite conceivable that the ramifications of Justice Powell's standard would not ultimately be limited to Fourth Amendment claims. He argues that evidence obtained from an illegal search and seizure is generally reliable, and petitions based upon an unlawful search with no constitutional claim bearing on the prisoner's innocence should not be considered on collateral review. *Schneckloth v. Bustamonte, supra*, 412 U.S. at 258 (Powell, J., concurring). If this were to be the determinative test, then the inadmissibility of coerced confessions would appear destined to join the exclusionary rule in the same constitutional graveyard. This would follow because in *Lego v. Twomey*, 404 U.S. 477 (1971), a habeas corpus case, this Court held that the underlying rationale for the exclusion of coerced confessions is not enhancement of the reliability of the fact-finding process, but the deterrence of illegal methods used to obtain incriminating confessions: *Id*. at 486-87.

> "...We noted in Jackson [v. Denno, 378 U.S. 368 (1964)] that there may be a relationship between the involuntariness of a confession and its unreliability. But our decision was not based in the slightest on the fear that juries might misjudge the accuracy of confessions and arrive at erroneous determinations of guilt or innocence ....



> The use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles. *Lego v. Twomey, supra*, 404 U.S. at 484-85.

Search and seizure claims are no less deserving of federal habeas review than any other constitutional guarantee. To limit the writ to those constitutional claims that affect the determination of guilt and the reliability of the fact-finding process would frustrate the intended purpose of the writ as a procedural device to protect *all* due process rights. Arguments that the writ is inappropriate because it detracts from the finality of judgments, causes friction between state and federal courts, and does nothing to advance the interests of deterrence have all been dealt with here and in the past. Both Congress and the courts including this Court, have consistently rejected these contentions, yet petitioner insists on resurrecting them once again. It is time for this Court to establish and reconfirm that the Fourth Amendment claims of state prisoners are cognizable on habeas corpus, and that any modification of Section 2254 is properly a legislative function.

### C. An arrest authorized by a statute violating the Fourth, Fifth and Fourteenth Amendments is subject to Federal review by habeas corpus.

From the preceding discussion it is clear that *all* Fourth Amendment claims are subject to review by federal habeas corpus. The Court has also asked counsel to address the specific question of whether the validity of *this* search is cognizable under 28 U.S.C.§2254. Respondent suggests that only arrests and searches which are accompanied by violence on the order of pumping the

citizen's stomach should be reviewable on habeas corpus. (Petitioner's Brief, pp. 45-49); *Rochin v. California*, 342 U.S. 165 (1952). Petitioner then argues that an arrest under a statute which violates the Fourth, Fifth and Fourteenth Amendments is a mere "technical" violation of the constitution unworthy of federal court review on habeas corpus.

Respondent cites no authority for the proposition that habeas corpus reaches only some Fourth Amendment violations, but not others. One searches the statute (28 U.S.C.§2254) in vain for even a suggestion that the distinction was contemplated by Congress. Congress originally granted, and in 1966 reconfirmed, jurisdiction with respect to all incarceration in violation of the constitution. Since that grant was reconfirmed by Congress in 1966, a ruling that the statute means anything less would be nothing short of judicial legislation. (See Part VIIA *supra*).

Petitioner's suggestion, in effect, would rewrite the Fourth Amendment. The Amendment secures the people from unreasonable searches and seizures; the constitutional injunction is not addressed only to exceptionally unreasonable searches and seizures accompanied by brutality. Any remedy must be commensurate with the evil to which it is addressed. While petitioner concedes that "no one seriously doubts that evidence seized in wanton violation of the Fourth Amendment rights should be suppressed" (Petitioner's Brief, p. 47-48), apparently petitioner believes that "ordinary," as opposed to "wanton" violations of the constitution need not also be discouraged and should be winked at by the federal courts. Since this Court's *certiorari* review is, of necessity, limited, and this Court will seldom review a state case simply because it is wrong, the impact of Petitioner's



limitation on the effective implementation of the Fourth Amendment guarantee could be substantial. Petitioner's suggestion is nothing short of a covert attack on the Fourth Amendment. If the people are only to be secure from conduct "too close to the rack and the screw to permit constitutional differentiation" (*Rochin, supra*, 342 U.S. at 172), the appropriate constitutional process to amend the Fourth Amendment should be commenced.

Petitioner's suggestion is also a practical and procedural nightmare. District Court judges would not only have to decide whether or not the Fourth Amendment was violated, but they would then have to decide whether the violation was sufficiently flagrant to be "wanton." The unworkability of such a test accounts for the demise of the similar rule in *Rochin v. California*, 342 U.S. 165 (1952). There is nothing in the Fourth Amendment or in 28 U.S.C.§2254 suggesting that the *Rochin* rule should be resurrected at this time, or that Fourth Amendment law should regress to a time which Professor Amsterdam has characterized as "the nadir of fourth amendment development." A. Amsterdam, *Perspectives on the 4th Amendment*, 58 Minn. L. Rev. 349, 393-94 (1974).

Petitioner commits a more fundamental error in classifying the constitutional violations in this case as merely "technical." The fundamental rights violated by the Henderson ordinance are a veritable *tour de force* of the Bill of Rights. The law not only violates incorporated Fourth Amendment search-and-seizure and Fifth Amendment self-incrimination rights, but it also violates fundamental notions of fair notice, the presumption of innocence, and the right to travel interstate. The ordinance is a roving commission to arrest suspicious persons which is just short of a general warrant. (See Part III *supra*). One can hardly imagine a more direct and

egregious violation of the Fifth Amendment than arrest and imprisonment for invoking it. (See Part I *supra*). Arresting citizens for vaguely defined, dragnet crimes is an earmark of totalitarian governments.[40] There is hardly a more fundamental civil right than the presumption of innocence. (See Part II *supra*). Finally, the right to travel among our states, while perhaps not a right sharing the glamour of the proceeding ones, is nevertheless a fundamental privilege of United States citizens. (See Part III *supra*). If only by sheer dint of the number of violations, it cannot be said that the invasion of respondent's rights was merely technical.

Petitioner arrives at the startling conclusion that this case is unworthy of effective federal review by again committing the basic error of assuming that these fundamental rights are secure only from police and not legislative encroachment. (Petitioner's Brief pp. 47-49). It is precisely because the police will rely on the constitutionality of the statute that the people can only be secure in these rights if the federal courts stand ready to measure the law against the commands of the constitution. The fact that the law is still extant in both Nevada and California after 7 1/2 years merely underscores the appropriateness of federal review.

[40] *Papachristou, supra*, 405 U.S. at 168. In *People v. McKelvy*, 23 Cal. App. 3d 1027, 100 Cal. Rptr. 661 (1972), a case involving a California statue identical to the Henderson Ordinance, defendant was arrested while walking across lawns at 3:00 A.M. during a curfew imposed by the Mayor of San Bernardino because of riots. Although the court was not called upon to decide the constitutionality of the ordinance, the Court said "to deprive one of his freedom on such flimsy evidence smacks of totalitarianism. . . ." *Id*. at 666.



Petitioner's assertion that suppression "will have no effect on Officer Lattin, who probably does not remember respondent" (Petitioner's Brief, p. 48) is beside the point. These laws are still on the books, and other legislatures may be contemplating the adoption of similar laws. As explained above, the Fourth Amendment reaches all unreasonable searches and seizures, including those with a legislative origin. Consequently, suppression of the evidence is as appropriate now as it would be if the respondent's arrest took place only yesterday. The only disturbing fact about the 7 1/2 year interval between respondent's arrest and the present date is the fact that, although the evidence should have been suppressed in 1968, respondent has now served practically all of his sentence and is presently on parole. Respondent has pursued his case diligently through the courts ever since his arrest. If a delay in receiving a favorable judgment becomes an excuse for denying respondent relief, such a rule would only encourage states to protract post conviction proceedings in hopes of thereby avoiding an ultimate adverse judgment.

The particular appropriateness of federal review of state statutes which may violate the Fourth Amendment was confirmed by this Court in *Sibron v. New York*, 392 U.S. 40 (1967). In *Sibron* this Court retained jurisdiction to decide whether the statute was constitutional in spite of the fact that the District Attorney had confessed error.[41] To do otherwise would have been "an abdication of our obligation to lower courts to decide cases upon

[41] The confession of error came only after *federal* review became inevitable. See also *Patterson v. Lockhart*, 513 F.2d 579 (8th Cir. 1975) (error confessed on appeal from denial of writ).

proper constitutional grounds in a manner which permits them to conform their future behavior to the demands of the Constitution." *Id.* at 59.

The particular appropriateness of federal review of state statutes that have been upheld by state court's as constitutional was recognized by Congress when, in attempting to reduce this Court's caseload, Congress nevertheless provided that review may be had by appeal "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 U.S.C. §1257(2). This jurisdictional provision

> proceeds on the theory that through inadvertence or design those who are entrusted with the legislative power of a State may exercise the same in a manner forbidden by the Constitution of the United States and that the state courts may uphold such legislation when it should be held invalid. Unlike other state action, legislation consists of rules having continuing force and intended to be observed and applied in the future . . . . *King Manufacturing Co. v. Augusta*, 277 U.S. 100, 104 (1928).

The rule applies even though the state law takes the form of an ordinance (*King, supra*) which is criminal in nature. *Jamison v. Texas*, 318 U.S. 413 (1943), and the state court failed or refused to decide the constitutionality of the statute. *Lawrence v. State Tax Commission*, 386 U.S. 276, 282 (1932). The policy underlying Section 1257(2) is clear—it is important that the constitutionality of statutes, because of their intended broad application, be resolved, and there is a real danger that state courts, because of their proximity to state legislatures, will be hesitant to rule them unconstitutional. Independent federal court review in these circumstances is critical.



Because of this Court's burgeoning caseload, the perceived ease of seeking review by appeal rather than *certiorari* has been largely unrealized. To the extent that this Court, in order to maintain some control over its docket and to assure proper attention to all its cases, finds it necessary to treat *certiorari* and appeal similarly, the congressional scheme breaks down. Since the need for federal review has not diminished (indeed, with the gradual incorporation or absorption of the Bill of Rights in the Fourteenth Amendment, it has increased), federal habeas corpus is an appropriate vehicle to give litigants federal review in this situation.

This Court only last term held that federal habeas corpus was appropriate to challenge a search made under a statute practically identical (although slightly less vague) with the Henderson ordinance *even though the defendant had pleaded guilty in the state court proceeding. Lefkowitz v. Newsome*, __ U.S. __, 43 L. Ed.2d 200 (1975). It would have made little sense to affirm the grant of the writ in *Lefkowitz* if arrests and searches under unconstitutional statutes fell outside the ambit of 28 U.S.C. §2254.[42] The conclusion is inescapable that, even applying petitioner's suggested rule, federal habeas corpus is an appropriate vehicle to review respondent's arrest and search.

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[42] Either the scope of federal habeas corpus is not a jurisdictional question, therefore it was waived by petitioner's failure timely to raise it, or the question is jurisdictional and was resolved in favor of respondent by this Court's holding in *Lefkowitz, supra*.

**D. If the court establishes a new rule that habeas corpus is no longer available to review Fourth Amendment claims, the new rule should not apply to respondent.**

There was no doubt about the propriety of habeas corpus to review Fourth Amendment claims at the time respondent filed his petition in the Federal District Court. Consequently, respondent followed the ordinary, and possibly preferred (*See Fay v. Noia*, 372 U.S. 391 (1963)), procedure of seeking federal habeas corpus rather than applying for a writ of *certiorari*. Since the time to apply for *certiorari* has now passed, to now change the *Kaufman* rule to eliminate habeas corpus would be clearly unfair in that it would effectively deny respondent the opportunity for any federal review whatsoever.

When this Court changes a jurisdictional rule on which a litigant has relied, and the litigant, had he known of the pending change, would have had an alternative means of invoking federal jurisdiction, then the Court has the discretion to announce a purely prospective ruling. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 422-423 (1964); *see* W. Schaeffer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U.L. Rev. 631 (1967). In *England* this Court merely clarified a prior decision (*Government and Civic Organizing Committee v. Windsor*, 353 U.S. 364 (1964)), yet because the plaintiff had relied in good faith on a different interpretation of the case, the Court applied its new ruling purely prospectively.

> On the record in the instant case, the rule we announce today would call for affirmance of the District Court's judgment. But we are unwilling to apply the rule against these appellants. As we have noted, their primary reason for litigating their federal claims in the state courts was assertedly a view that *Windsor* required them to do so. That view was mistaken, and will not avail other litigants who rely upon it after today's decision. But we cannot say, in the face of the support given the view by respectable authorities, including the court below, that appellants were unreasonable in holding it or acting upon it. We therefore hold that the District Court should not have dismissed their action. *England, supra*, 375 U.S. at 422-23.



If prospective overruling was fair in *England*, where the Court was merely clarifying a prior holding, the fairness of prospective overruling is manifest when the Court is overruling a prior decision squarely on point. Forfeiture of the right to apply for *certiorari* because petitioner relied on this Court's clear holdings that habeas corpus was appropriate would be unconscionable. Moreover, there is no countervailing reason why petitioner should be given the benefit of the new rule *in this case*. The real party in interest, the State of California, undoubtedly has and will have numerous federal habeas corpus petitions raising Fourth Amendment issues which the state must defend. Consequently, this Court may be assured that petitioner has a sufficient stake in the outcome of this issue to insure that the question will be presented in a truly adversary proceeding. It is fair to say that even with advance knowledge that the new rule would be applied purely prospectively, petitioner would brief and argue the issue with equal vigor. In addition, petitioner failed to raise the question of the propriety of habeas corpus in the District Court. (App. 58-73). Apparently even petitioner had no serious doubts about the propriety of habeas corpus until it was raised, almost as an afterthought, for the

first time in their reply brief before the Ninth Circuit. See 507 F.2d at 97 n.4.

## VIII

### IT CANNOT BE SAID BEYOND A REASONABLE DOUBT THAT EVIDENCE OF RESPONDENT'S CAPTURE IN POSSESSION OF THE MURDER WEAPON DID NOT CONTRIBUTE TO THE JURY'S VERDICT

At respondent's trial Officer Lattin was brought from Henderson, Nevada in order to testify to the arrest and search of defendant which produced the murder weapon. He also testified to respondent's attempt to change his name at the police station. The gun, itself, was introduced into evidence, and a criminalogist testified that it was the same gun that fired the fatal bullet. The United States Court of Appeals for the Ninth Circuit, after carefully reviewing the record of the trial, concluded that it could not "in good conscience" conclude beyond a reasonable doubt that this evidence did not contribute to respondent's conviction.[43] 507 F.2d at 98-99; *Chapman v. California*, 386 U.S. 18, 24 (1967).[44]

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[43]The court below did not consider the prejudicial impact of respondent's attempt to change his name at the Henderson police station. Since the Court found the evidence concerning the seizure of the gun to be prejudicial, there was no need to do so.

[44]The California District Court of Appeal and the United States District Court concluded that the evidence of respondent's possession of the murder weapon "was not required to establish any element of the crime charged." This is the wrong test. Under *Chapman v. California*, 386 U.S. 18 (1967), unconstitutionally seized evidence is harmless only if the court can say "that the State has demonstrated, beyond a reasonable doubt, that the admission of the unlawfully seized evidence did not contribute to respondent's conviction. . . ." *Id.* at 24.



On the facts of this case, the Ninth Circuit's conclusion is clearly correct. In the absence of the gun or evidence of respondent's possession of the weapon, respondent could well have been acquitted. Even if he were not completely acquitted, the illegally seized evidence undoubtedly had an impact on the jury's consideration of the seriousness of the offense, pushing the jurors towards second degree murder rather than voluntary or involuntary manslaughter. Indeed, if this were not the intended and obvious impact of the evidence, it is difficult to imagine why the prosecutor went to so much trouble, and risked reversal, to introduce it.

At the trial there was only one witness, Mr. Buckley, who testified that he was in the room when Mrs. Parsons was shot. Unfortunately, one cannot say which version of his testimony should be believed. During the first day of Mr. Buckley's testimony he stated that he did not see, or could not remember seeing, respondent with the gun. He also testified that the gun went off while all three (Mr. and Mrs. Parsons and respondent) were wrestling over it, and that Mrs. Parsons was throwing things at respondent and beating him on the head with a stamp dispenser. The prosecution attempted to impeach Mr. Buckley with a statement he had given to a police officer while he was in the hospital. The officer's statement said "the next thing he [Buckley] knew was that Lloyd [respondent] had the gun and first of all shot the manager's wife, and then the manager." The trial recessed for a holiday, and when Mr. Buckley again took the stand he changed his testimony and testified that he "believed" that respondent had the gun in his hand. The record suggests a number of reasons why Mr. Buckley changed his testimony. Mr. Buckley had originally been charged with the murder, and on cross-examination he admitted that, although the charge had

been dropped at the preliminary hearing, he knew the charge could be reinstated at any time. There was also strong evidence that Mr. Buckley was guilty of attempted larceny from the cash register. In addition, Mr. Buckley's testimony, if read in conjunction with Mr. Parsons' testimony, would place Mr. Buckley as the only person in the liquor store when Mrs. Parsons was shot. The statement given to the officer in the hospital was given while Mr. Buckley was suffering from intoxication, pain and loss of blood. He was also under arrest for attempted murder, and he testified that he gave the statement in order to show that he was not responsible (Tr. 118). Given the additional fact that Mr. Parsons testified that the shooting occurred in the opposite order (first he was shot, then he left the room and Mrs. Parsons was shot), the jury would have been justified in rejecting Mr. Buckley's testimony on these critical issues.

There is no question that Mr. Parsons, not respondent, was the first to introduce deadly force into this confrontation. In fact, Mr. Parsons testified that he fired the first shot. Although he testified that he placed the gun behind the ice-cream freezer, Messrs. Chaney, Mercer and Buckley testified that the gun first went off while respondent and Mr. Parsons were struggling over it. In the course of the struggle, Mrs. Parsons, a 380-pound woman, had launched a furious assault on respondent, throwing things at him and beating him on the back of the head with a stamp dispenser. Mr. Buckley testified that all of the shots, including the fatal one, were fired while all three were struggling over the gun.

Given this state of the record, the jury was instructed extensively on doctrines of self-defense, justifiable homicide, and the law regarding the extent to which a landowner may use force to eject a trespasser. The jury



was also given five possible verdicts: (1) first degree murder; (2) second degree murder; (3) voluntary manslaughter; (4) involuntary manslaughter; (5) not guilty. The jury convicted respondent of second degree murder. Against this background, it cannot be said beyond a reasonable doubt that the illegally seized evidence did not contribute to the fact of conviction or to the degree of the crime.

The fact that respondent was found in possession of the death weapon on the same day as the shooting is hardly trivial evidence of guilt. It shows that, at least at some time, he had exclusive control of the weapon. It would tend to corroborate Mr. Buckley's second version of what happened, and it would tend to eliminate the possibility that either Mr. Buckley or Mr. Chaney (who also fled and was arrested with respondent) was guilty of the crime. It would also tend to raise the degree of the crime, because it would be some evidence that he had exclusive possession of the weapon at the time the fatal shot was fired.

In addition, the fact that respondent was arrested while armed with this gun in a shopping center would create the impression that he might have intended to commit some further crime, and therefore, was an evil desperate man of violence. 407 F.2d at 99. When the fact is added that the gun contained six expended cartridges, while only three shots were fired in the liquor store, the impact of this evidence on the degree of the crime is obvious. Likewise, respondent's attempt to change his name at the police station only exacerbates the impact of this evidence.

While the identity of the person responsible for the shooting was a serious issue at the trial, the degree of respondent's culpability, if any, was even more hotly

contested. There was substantial evidence that the fatal shot was fired during a violent struggle over possession of the gun (*E.g.*, Tr. 70-71, 73, 80-81, 103-05, 169). On this record, the jury could have concluded that the shooting was an accident or self-defense. Likewise, the jury could have concluded that at most it was involuntary or voluntary manslaughter.

After stating several times in final argument that the only real issue was "intent" (Reporter's Partial Transcript 28, 37, 39, hereinafter R.P.T.), the prosecutor took the weapon seized from the defendant and demonstrated the force needed to pull the trigger. He invited the jury to "pull the trigger" in order that each juror might decide for himself "that it doesn't fire accidentally and it doesn't hit people accidentally either." (R.P.T. 37, 38). In determining the degree of the crime in a death by gunshot case, it is obvious that when there has been a struggle over the gun the single most important piece of evidence tending to escalate the degree of the crime can be the trigger pull on the fatal weapon.

The prosecuting attorney certainly appreciated the importance of this evidence. He brought Officer Lattin all the way from Henderson in order to introduce it. He called Mr. Davidson, a ballistics expert, in order to prove that the gun in respondent's possession was the fatal weapon. Most importantly, he risked the reversal of this case in order to introduce the weapon and Officer Lattin's testimony. A seasoned trial attorney is hardly going to risk reversal of his case in order to introduce evidence that he believes beyond a reasonable doubt will have no impact on the outcome of the trial. It hardly



behooves petitioner to now argue that this evidence could have had no impact on the jury's verdict.

## CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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# In the Supreme Court
OF THE
# United States

Supreme Court, U. S.
FILED
JAN 30 1976
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1975

## No. 74-1055

W. T. STONE, Warden,
*Petitioner,*

vs.

LLOYD CHARLES POWELL,
*Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1975

No. 74-1055

W. T. STONE, Warden,
*Petitioner,*

vs.

LLOYD CHARLES POWELL,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## CLOSING BRIEF FOR THE PETITIONER

### ARGUMENT

### I

### THE EXCLUSIONARY RULE DOES NOT REQUIRE SUPPRESSION OF EVIDENCE IN THIS CASE

Petitioner reiterates his position that the ordinance under which respondent was arrested is constitutional. In reply to respondent's various claims of unconstitutionality (RB 17-41), we submit that the ordinance was not impermissibly vague, did not create a presumption that loiterers commit crimes, and did not

relieve the prosecution of its burden of proving guilt beyond a reasonable doubt. The ordinance did not require a suspect to forfeit his privilege against self-incrimination and did not abridge the right to interstate travel. Assuming, without conceding, that the ordinance was constitutionally repugnant for one or more of the above reasons, the arresting officer could not reasonably have been charged with knowledge of the law's invalidity.

The information which the officer received from respondent during questioning was not coerced under the standards of the Fifth and Fourteenth Amendments. Hence, the information constituting probable cause was lawfully obtained. The arrest was therefore valid.

Nor did the statute violate the Fourth Amendment, because the mere *enactment* of a law cannot transgress the terms of that Amendment, which governs searches and seizures. We acknowledge that the *implementation* of a statute can violate the Fourth Amendment. We have never contended that a statute can authorize an unreasonable search or seizure. However, the existence of a statute is relevant in determining whether a violation of the Fourth Amendment compels suppression of evidence. If the officer's reliance upon the statute was reasonable and in good faith, then suppression will have no deterrent value and will not vindicate the imperative of judicial integrity.

There is no merit to respondent's argument that suppression of evidence is necessary to deter legislatures from enacting invalid statutes (RB 48-50). That



purpose can be adequately served by the invalidation of the offending statute. Respondent's claim, that the ordinance was enacted to permit arrests and searches upon less than probable cause (RB 53 & n.26), is untenable. The ordinance was passed years before this Court's decision in *Papachristou v. Jacksonville*, 405 U.S. 156 (1972), and was based upon a model suggested by a distinguished commentator.

Also unsupportable is respondent's contention that it is impossible to attack the validity of a vagrancy law on appeal from a conviction for vagrancy because no one is ever prosecuted for that crime (RB 53-54). Empirical evidence establishes that persons are prosecuted for vagrancy and loitering; hence, attacks upon such statutes are possible.

Respondent's contention, that the case-or-controversy rule requires suppression of the evidence if the ordinance was invalid (RB 58-59), is premised upon his erroneous assumption that a violation of the Fourth Amendment *ipso facto* activates the exclusionary rule. Suppression of evidence is a societal, not a personal, right; if no purpose is served by suppression, then the violation, if any, of the Fourth Amendment in this case does not require exclusion of reliable evidence. The case-or-controversy requirement is satisfied by a determination of the relief to which respondent is entitled. Since suppression would serve no recognized purpose, respondent is entitled to no relief.

Alternatively, respondent argues that he should be granted a new trial because, as a "constitutional inno-

vator," he successfully challenged the validity of the ordinance under which he was arrested (RB 59-60). If he is not granted relief, respondent concludes, others who are similarly situated will have no incentive to attack the statutes authorizing their arrests. Petitioner replies that a person such as respondent, who is arrested for vagrancy but prosecuted for another, more serious, crime, will *always* have cause to challenge the vagrancy statute authorizing his arrest. The constitutionality of a statute is relevant to a determination of the existence of reasonableness and good faith. Thus, if an arrestee can prove the invalidity of the statute under which he was arrested, the burden will fall upon the State to establish that reliance upon the statute was reasonable and in good faith. If it cannot carry the burden, the defendant will prevail. We submit that the State has met its burden in this case.

**A. The vagrancy ordinance is constitutional.**

We reiterate our position, set forth in the Petitioner's Brief (pp. 49-53), that the ordinance was sufficiently precise to satisfy the due process requirement of fair notice and that it did not make innocent conduct unlawful. Turning to respondent's argument that the ordinance violated his privilege against self-incrimination (RB 17-21), we note that this Court has declared that an officer may make "reasonable inquiries" of those suspected of crime. *Terry v. Ohio,* 392 U.S. 1, 30 (1968). Certainly the questions posed by Officer Lattin regarding respondent's iden-



tity and the reason for his presence in Henderson must be considered constitutionally reasonable. *Cf. California v. Byers,* 402 U.S. 424 (1971).

Next, respondent argues that the ordinance created an invalid presumption that loiterers commit crimes (RB 21-22; *see Leary v. United States,* 395 U.S. 6, 29-53 [1969]) and permitted conviction without evidence establishing guilt beyond a reasonable doubt (RB 22). Preliminarily we observe that these contentions are raised for the first time, not having been argued before the District Court or Court of Appeals. This Court, following well-settled precedent, should decline to consider those new theories. *See Lawn v. United States,* 355 U.S. 339, 362 n.16 (1958); *United States v. Fleischman,* 339 U.S. 349, 365 (1950); *Husty v. United States,* 282 U.S. 694, 701-02 (1931); *Duignan v. United States,* 274 U.S. 195, 200 (1927).

We nevertheless address the merits of respondent's claims. The ordinance creates no presumptions. There is no requirement that a jury presume a fact from facts proved at trial. *See Leary v. United States, supra,* 395 U.S. at 33-36. Had respondent been brought to trial for violation of the ordinance, the prosecution would have had to prove that he had wandered the streets without apparent business, and had refused to identify himself under circumstances indicating that identification was necessary to the public safety. Not only was it necessary that each element be proved rather than presumed, each had to be established beyond a reasonable doubt. The ordinance does not lessen this burden which the Constitution has

placed upon the prosecution. *See In re Winship*, 397 U.S. 358 (1970).

But, argues respondent, once a suspect appears to be loitering, he bears the burden of justifying his presence; if he cannot establish that he is innocent of any wrongful conduct, he will be found guilty. The first prong of respondent's argument is simply a refashioning of his contention that the ordinance makes innocent conduct illegal (RB 24-25). The crux of his argument is not that the ordinance creates an invalid presumption for use at trial; rather, it is that loitering or wandering, being innocent behavior, cannot constitute a crime and that therefore Officer Lattin should not have questioned a man who appeared to have been loitering. The problem with respondent's position is that the offense defined by the ordinance includes more than the single element of loitering. The law is violated if a person: (1) loiters without apparent reason; (2) refuses to identify himself; *and* (3) refuses to account for his presence when the circumstances justify such disclosure. To say that an innocent act by itself cannot be a crime misses the point. Entrance into a public building is also innocent conduct; it becomes criminal if the person entering has an intent to commit a felony. It should be apparent that respondent's claim that the ordinance creates an invalid presumption is specious.[1]

[1]This contention presents the subsidiary argument that the officer's conduct in detaining and questioning respondent upon observing his suspicious behavior was unreasonable. That argument must founder on the shoals of the District Court's finding that there was probable cause to arrest respondent. We do not perceive how an arrest based upon probable cause can be unreasonable.



The second prong of respondent's argument—that he must explain his presence or else be convicted of violating the ordinance—is also a restatement of an argument previously made. The requirement that a suspect identify himself and justify his presence does not relieve the prosecution of proving beyond a reasonable doubt all elements of the offense. Respondent is actually contending that the requirement of disclosure violates his privilege against self-incrimination. That argument has already been refuted.

Adverting to respondent's claim that the ordinance has a chilling effect on the right to interstate travel (RB 25-26), we again point out that this argument was not raised in the lower courts and should not be considered by this Court. Addressing the merits, we note that this Court has declared, "that the States are not wholly precluded from exercising their police power in matters of local concern even though they may thereby affect interstate commerce." *Edwards v. California*, 314 U.S. 160, 172-73 (1941). We submit that the City of Henderson was justifiably concerned about persons who had no lawful business and who refused to disclose their identities or their reasons for being in that municipality. To argue that the vagrancy ordinance trenches upon the right to travel interstate is to assert that all penal statutes suffer from the same constitutional invalidity. Respondent's position must be rejected.

We will assume, without conceding, that the ordinance is constitutionally infirm for one or more of the reasons above discussed. The pertinent inquiry is not

whether the ordinance was invalid, but whether Officer Lattin or any police officer "had knowledge, or may properly be charged with knowledge," that the law violated constitutional guarantees. *United States v. Peltier,* 422 U.S. 531, 542 (1975). We submit that no police officer can be charged with the knowledge which may be gleaned by a scholar in constitutional law only after many hours of diligent research and creative ratiocination. Respondent may be a constitutional innovator, but there is no reason why policemen should be. Officer Lattin was entitled to assume that the ordinance, whose validity had never been questioned as of February 18, 1968, was constitutional and that it defined a public offense which the respondent was committing. Any infirmities in the ordinance are simply irrelevant to the disposition of this case.

**B. Respondent's statements to Officer Lattin were not coerced.**

Although petitioner maintains that the arrest of respondent was reasonable even if the ordinance was unconstitutional, it is necessary to discuss again the claim that the law violated the privilege against self-incrimination. If the answers of respondent were coerced, or if his silence was an invocation of his right not to incriminate himself, the facts constituting probable cause to arrest were tainted and the arrest and search would consequently be unlawful. *See Wong Sun v. United States,* 371 U.S. 471 (1963).

The record establishes that Officer Lattin could not have relied upon respondent's silence in assessing probable cause because respondent was never silent. Respondent answered all of the questions which the police officer asked (App. 8-19). As respondent did not exercise his privilege against self-incrimination *(cf. Griffin v. California,* 380 U.S. 609 [1965]), he cannot now claim he was penalized for having done so.



Turning to the related argument that his statements to Officer Lattin were coerced, we submit that there is no evidence in the record to establish that respondent's answers were involuntary. Officer Lattin was not obliged to advise respondent of his constitutional right to remain silent, for *Miranda v. Arizona,* 384 U.S. 436 (1966), does not apply to non-custodial, on-the-street questioning. *Id.* at 477-78; *see Schneckloth v. Bustamonte,* 412 U.S. 218, 232, 245, 247-48 (1973); *United States v. Tobin,* 429 F.2d 1261, 1262-64 (8th Cir. 1970); *United States v. Diaz,* 427 F.2d 636, 638 (1st Cir. 1970); *United States v. Hall,* 421 F.2d 540 (2d Cir. 1969), *cert. denied,* 397 U.S. 990 (1970); *Lowe v. United States,* 407 F.2d 1391 (9th Cir. 1969); *United States v. Gibson,* 392 F.2d 373 (4th Cir. 1968); *Allen v. United States,* 390 F.2d 476, 478-79 (D.C. Cir. 1968); *United States v. Messina,* 388 F.2d 393, 395 (2d Cir.), *cert. denied,* 390 U.S. 1026 (1968).

Nor is there any indication that respondent's replies to the officer's inquiries were involuntary in the traditional sense of the term. Indeed, he does not even contend that "his will [was] overborne [or] his capacity for self-determination critically impaired. . . ." *Culombe v. Connecticut,* 367 U.S. 568, 602 (1961). Rather, respondent willingly answered questions posed by a police officer who was merely attempting to ascertain his identity and the reason for his

presence in Henderson, Nevada. Thus, respondent's statements, which partially served to establish probable cause for arrest, were freely made. As no information known to Officer Lattin was tainted by illegality, the arrest and search were lawful.

**C. The enactment of a statute cannot violate the Fourth Amendment.**

Respondent professes surprise akin to shocked disbelief at our position that the enactment of a statute cannot violate the terms of the Fourth Amendment, which prohibits unreasonable searches and seizures. He apparently has interpreted our argument to mean that a legislature can authorize a violation of the Fourth Amendment by the passage of a law (RB 34-37). If that is his understanding of our position, we wish to disabuse him of his misapprehension. We again acknowledge, as we did in the Petitioner's Brief (at 16, 17 n.4), that an otherwise unconstitutional search cannot be made lawful by a statute. *E.g., Almeida-Sanchez v. United States,* 413 U.S. 266, 272 (1973). A legislature obviously cannot authorize what the Constitution forbids. We contend only that the *enactment,* as opposed to the *implementation,* of a statute cannot violate the Fourth Amendment because the provisions of that amendment are specifically aimed at the conduct of law enforcement officers, who conduct searches and seizures, and magistrates, who issue warrants. The passage of a statute, without more, cannot violate the Fourth Amendment because no person has been arrested or searched; no one's privacy has yet been ruptured. If, as respondent



contends, the enactment of a statute can violate the Fourth Amendment rights of every person, then everyone within the political entity governed by the legislature would have standing to challenge the law—a proposition which the respondent expressly denies (RB 56-59).

The conceptual flaw of respondent's position becomes obvious from an analysis of the reasons given by the Court of Appeals in support of its holding that the ordinance violated the Fourth Amendment. First, the court declared that the ordinance

> "authorizes arrest *and conviction* for conduct that is no more than suspicious. A legislature could not reduce the standard for arrest from probable cause to suspicion; and it may not accomplish the same result indirectly by making suspicious conduct a substantive offense. Vagrancy statutes do just that, for they authorize arrest *and conviction* for the vagrancy offense if there are reasonable grounds to suspect that the accused may have committed, or if left at large will commit, a more serious offense." *Powell v. Stone,* 507 F.2d 93, 96 (9th Cir. 1974) (emphasis added).

It is true that innocent or suspicious conduct cannot be made criminal, but enactment of such statutes is forbidden by the Due Process Clause of the *Fifth* Amendment. The court found that the ordinance permitted conviction for suspicious conduct, but did not recognize that the Fourth Amendment is inapplicable to the validity of convictions. If the Court of Appeals is correct that the ordinance does not define a constitutionally valid substantive offense, it is because

the Due Process Clause, not the Fourth Amendment, proscribes such laws.

Second, the court held that the ordinance was so vague that its provisions could never permit a reasonable man to believe that it had been violated. 507 F.2d at 96-97. The court was actually saying that probable cause did not exist for the arrest of respondent under the provisions of the ordinance. If in fact probable cause was lacking, then the arrest was invalid under familiar Fourth Amendment principles. *E.g., Beck v. Ohio,* 379 U.S. 89 (1964). However, that conclusion cannot stand in light of the District Court's factual finding that Officer Lattin had probable cause to arrest respondent.[2]

In sum, the holding of the Court of Appeals—adopted by respondent—that the ordinance violated the Fourth Amendment was both conceptually untenable and factually incorrect. The cases cited by respondent do not compel a contrary conclusion. In *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975); *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973); *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *Sibron v. New York,* 392 U.S. 40 (1968); and *Stanford v. Texas,* 379 U.S. 476 (1965), the search,

[2]Respondent argues that there can never be probable cause under an unconstitutional statute (RB 39). His argument obviously paints with too broad a brush. A law prohibiting women from entering public buildings is constitutionally repugnant, yet there can be probable cause to believe that a woman is entering a public building. If respondent intends to take the more modest position that probable cause cannot exist under a vague statute, we reply that he has failed totally to refute our analysis at pages 21-23 of the Petitioner's Brief. We submit that his failure underscores the validity of our position.



not the authorizing statute, was found to have violated the Fourth Amendment. Indeed, *Sibron* declares expressly that the "question in this Court upon review of a state-approved search or seizure 'is not whether the search [or seizure] was authorized by state law. The question is rather whether the *search* was reasonable under the Fourth Amendment.'" 392 U.S. at 61 (emphasis added). *See also Berger v. New York,* 388 U.S. 41 (1967) (semble).

*See v. Seattle,* 387 U.S. 541 (1967); and *Camara v. Municipal Court,* 387 U.S. 523 (1967), held that a person cannot be prosecuted for asserting his right to be free from an unreasonable search and seizure. But not until an unconstitutional invasion was threatened by authorities were the defendants compelled to assert their rights. In *Boyd v. United States,* 116 U.S. 616 (1886), the production of documents was the constitutional equivalent of a coerced consent to search. *Cf. Bumper v. North Carolina,* 391 U.S. 543 (1968); *see also United States v. Dionisio,* 410 U.S. 1, 8-16 (1973); *Hale v. Henkel,* 201 U.S. 43, 76-77 (1906).

We reiterate that the existence of a law cannot violate the Fourth Amendment. Not until an unconstitutional invasion of a person's property or effects is conducted or threatened do the provisions of the Fourth Amendment become applicable. The ordinance of Henderson, Nevada, standing alone, did not violate the Fourth Amendment. The relevant inquiries are whether Officer Lattin's conduct violated that amendment and whether any useful purpose would be served by suppressing the evidence which he found.

**D. Suppression of evidence would not deter police misconduct.**

We again acknowledge that a statute cannot make lawful an unconstitutional search. However, the existence of a statute is relevant in determining the legal ramifications of an unlawful search. *United States v. Peltier, supra,* teaches that suppression of evidence is inappropriate if police officers reasonably and in good faith have relied upon a statute authorizing a search or seizure. Respondent argues that this principle would permit the use of any evidence found pursuant to the execution of a statute until that statute is invalidated. Thus, even if the law is obviously unconstitutional, the evidence would still be admitted at trial (RB 42).

Respondent has again misconceived our position. Reliance must not only be *actual,* it must also be *reasonable.* We will use as an illustration respondent's suggested statute which makes it unlawful to be Mexican (RB 42). We concede that an arrest under that law would be unreasonable because reliance upon such a statute, no matter how genuine, would be unreasonable. We argue that police officers cannot be constitutional scholars, but we do not contend that they may live in a social or political vacuum. *Peltier* contemplates that, under certain circumstances, policemen "may properly be charged with knowledge" that a search was unconstitutional. 422 U.S. at 542. It is clear that an officer should know that it cannot be made unlawful to be Mexican and that he cannot arrest a person for that "crime." It is also clear that the ordinance in the instant case does not descend to



that level. As there was reasonable and good-faith reliance upon the ordinance, the purpose of deterring police misconduct would not be served by excluding the evidence.[3]

**E. No other recognized purpose would be served by the suppression of evidence.**

Respondent tells us that deterrence of police misconduct is not the only purpose to be served by the exclusionary rule. First, suppression is the necessary

[3]If the purpose of the exclusionary rule is to deter police misconduct it is pertinent to ask why evidence seized pursuant to an invalid search warrant is suppressed. In that situation police have not engaged in misconduct in the ordinary sense of the word; they have relied upon a judicial determination of probable cause. Several possible answers suggest themselves. First, the police officer executing the warrant is charged with the knowledge that the facts in the affidavit do not establish probable cause. Thus, he is held to know that he should not conduct the search.

Second, since the Fourth Amendment specifically prohibits search warrants issued upon less than probable cause, evidence seized during the execution of such warrants should be suppressed. *See United States v. Peltier, supra,* 422 U.S. at 558 n.18 (Brennan, J., dissenting). In light of the English and Colonial experience with general warrants and writs of assistance (*see Marcus v. Search Warrant,* 367 U.S. 717, 724-29 [1961]; *Frank v. Maryland,* 359 U.S. 360, 363-66 [1959]), suppression of evidence would seem to be historically compelled.

Third, a mistrust of magistrates, some of whom may acquiesce in the issuance of any search warrant sought by the police, may leave courts reluctant to hold that evidence seized under an invalid warrant may be admissible.

None of these reasons is convincing. Police are constantly encouraged to secure warrants before conducting searches. It would be an intolerable burden to require that they also second-guess the magistrate's finding of probable cause. Police should be permitted to rely upon the magistrate's assessment of the facts; probable cause is essentially a legal question.

It is true that the Fourth Amendment was adopted to forbid the issuance of warrants upon less than probable cause. However, the exclusionary rule was not engrafted onto the amendment until this Court decided *Weeks v. United States,* 232 U.S. 383 (1914). The question is what the exclusionary rule requires. If no deterrent purpose is served by suppression of evidence, it is meaning-

concomitant to judicial review of an invalid search. Next, the imperative of judicial integrity requires that evidence tainted by illegality be suppressed. Finally, legislatures can be deterred from enacting invalid measures only by excluding evidence from trial (RB 42-52).

The argument that judicial review requires suppression of evidence taken during an unconstitutional search is fully set forth in the provocative article, Schrock and Welsh, *Up from* Calandra: *The Exclusionary Rule as a Constitutional Requirement,* 59 Minn. L.Rev. 251, 355-66 (1974). The authors argue that the Constitution requires "that unconstitutional behavior of a governmental actor be declared invalid and void if brought before a court." *Id.* at 359. Invalidation of an illegal search, according to this thesis, requires that the fruits of the search be excluded from evidence. That argument proceeds from the premise, as the authors candidly admit *(id.* at 302, 319), that a defendant has a personal right to the exclusion of evidence, a proposition which this Court has expressly

less to exclude evidence simply because it was seized pursuant to an invalid warrant.

Neither should evidence be suppressed to deter magistrates from issuing warrants upon less than probable cause. The issuance of an invalid warrant typically occurs as a result of legal misjudgment; suppression of evidence, with the consequent setting free of guilty men, is far too drastic a remedy for an innocent mistake. Should the criminal go free because the magistrate has blundered? *Cf. People v. Defore,* 242 N.Y. 13, 21, 150 N.E. 585 (1926).

We recognize that this case is an inappropriate vehicle for the reexamination of the application of the exclusionary rule to warranted searches. *But see Wolff v. Rice,* USSC No. 74-1222. We nevertheless submit that suppression of evidence seized pursuant to a warrant rarely, if ever, serves the purpose of the rule.



repudiated. *United States v. Peltier, supra,* 422 U.S. at 538; *United States v. Calandra,* 414 U.S. 338, 347 (1974); *Linkletter v. Walker,* 381 U.S. 618, 637 (1965). It is too late in the day to resurrect that argument.

Judicial integrity, a nebulous concept at best, does not demand exclusion. *Peltier* explains that this rationale is "not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search and seizure have held that the conduct of the type engaged in by law enforcement officials is not permitted by the Constitution." 422 U.S. at 538. As Officer Lattin reasonably believed that the arrest under a presumptively valid ordinance was lawful, suppression of evidence would not vindicate judicial integrity.

Respondent's last justification for the exclusion of evidence is to deter legislatures from passing unconstitutional laws. Petitioner replies that this Court has stated explicitly that *"the purpose* of the exclusionary rule is to deter unlawful police conduct" *(United States v. Peltier, supra,* 422 U.S. at 542 [emphasis added]), not legislative misjudgment. Reason supports the limitation of the sanction of suppression to police misbehavior. As a practical matter, police officers can be advised that their conduct has violated the Fourth Amendment only by exclusion of the evidence which they seized during the violation. There is no other available official sanction. By contrast, a

legislature can be told that its laws are constitutionally repugnant by the invalidation of those measures. There should be a symmetry between the violation and the sanction. The fruits of police misconduct are evidence; the evidence should be excluded. The fruits of legislative misjudgment are unconstitutional statutes; the statutes should be rendered unenforceable.

But, argues respondent, if "this Court suppresses the evidence seized under the Henderson ordinance, then it is unlikely that any legislative body—local, state or federal—is again going to adopt a vagrancy ordinance like the Henderson one only to see arrests and searches under it invalidated and the evidence suppressed" (RB 52). Respondent asserts that invalidation plus suppression will make it even less likely that legislatures will pass such laws, but he has not proven his case. Simply put, he has not explained why the town council of Henderson or any legislative body will be more impressed by suppression and invalidation than they will be by invalidation alone. Suppression is superfluous in this case. This Court should not reverse a murder conviction on the outside—and unproven—chance that otherwise legislatures will not take its pronouncements seriously.

Respondent argues further that the "legislative history" of vagrancy laws indicates they are enacted to allow officers to conduct arrests and searches on less than probable cause. (RB 53 & n.26). This argument proceeds from the premise that each



legislature which has passed a vagrancy law has done so with the knowledge that it was constitutionally defective. Respondent's assumption is profoundly disturbing because its attribution of bad faith to all legislatures is a rejection of one of the cornerstones upon which democratic government is based. Respondent asks this Court to assume that legislatures—all legislatures—cannot be trusted and that only the federal judiciary is solicitous of the personal liberties of American citizens. We respectfully ask this Court to reject such an irresponsible and antidemocratic assumption.

Nor does the legislative history of the ordinance support respondent's cabalistic view. The ordinance is based upon a state statute (NRS § 207.030(h)) and conforms to a measure proposed by a scholar who commented that it "requires serious and careful consideration because of the practical necessities of police responsibility for the preservation of law and order." Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision,* 48 Calif. L.Rev. 557, 571 (1960). Furthermore, enactment of the ordinance antedates by several years this Court's decision in *Papachristou v. Jacksonville,* 405 U.S. 156 (1972). In light of legislative leadership, scholarly encouragement, and judicial silence, any claim that the ordinance was enacted in bad faith is untenable.

Respondent argues alternatively that no one is ever prosecuted under vagrancy laws and that therefore

those laws can be challenged only by a motion to suppress evidence seized pursuant to an arrest for vagrancy or loitering. Respondent's factual premise is totally undermined by empirical data. In the last few years the constitutionality of vagrancy and loitering laws has become a fertile area for litigation, either after conviction or upon a threat of prosecution. *E.g., Papachristou v. Jacksonville,* 405 U.S. 156 (1972); *Palmer v. Euclid,* 402 U.S. 544 (1971); *Shuttlesworth v. Birmingham,* 382 U.S. 87 (1965); *United States v. Cassiagnol,* 420 F.2d 868 (4th Cir), *cert. denied,* 397 U.S. 1044 (1970); *Ricks v. District of Columbia,* 414 F.2d 1097 (D.C. Cir. 1968); *Cantrell v. Folsom,* 332 F.Supp. 767 (M.D. Fla. 1971); *Scott v. District Attorney,* 309 F.Supp. 833 (E.D.La. 1970), *aff'd,* 437 F.2d 500 (5th Cir. 1971); *United States v. Sroka,* 307 F.Supp. 400 (E.D.Wis. 1969); *State ex rel. Williams v. City Court,* 21 Ariz.App. 489, 520 P.2d 1166 (1974); *People v. Solomon,* 33 Cal.App.3d 429, 108 Cal.Rptr. 867 (1973); *In re Nancy C.,* 28 Cal.App.3d 747, 105 Cal.Rptr. 113 (1972); *People v. Gibson,* 521 P.2d 774 (Colo. 1974); *Arnold v. Denver,* 171 Colo. 1, 464 P.2d 515 (1970); *Wallace v. State,* 224 Ga. 255, 161 S.E.2d 288 (1968); *Soles v. Vidalia,* 92 Ga.App. 839, 90 S.E. 2d 249 (1955); *State v. Grahovac,* 52 Hawaii 527, 556, 480 P.2d 148 (1971); *Henrichs v. Hildreth,* 207 N.W. 2d 805 (Ia. 1973); *State v. Aucoin,* 278 A.2d 395 (Me. 1971); *Knowlton v. State,* 257 A.2d 409 (Me. 1969); *People v. Ritchey,* 25 Mich.App. 98, 181 N.W.2d 87 (1970); *People v. Wedlow,* 17 Mich.App. 134, 169 N.W.2d 145 (1969); *State v. Armstrong,* 162 N.W.2d



357 (Minn. 1968); *State v. Hudson,* 111 N.H. 25, 274 A.2d 878 (1971); *State v. Caez,* 81 N.J.Super. 315, 195 A.2d 496 (1963); *People v. Berck,* 32 N.Y.2d 567, 300 N.E.2d 411, 347 N.Y.S.2d 33, *cert. denied,* 414 U.S. 1093 (1973); *People v. Lewis,* 70 Misc.2d 41, 332 N.Y.S.2d 929 (1972); *People v. Willmott,* 67 Misc.2d 709, 324 N.Y.S.2d 616 (1971); *People v. Strauss,* 66 Misc.2d 268, 320 N.Y.S.2d 628 (1971); *People v. Taggart,* 66 Misc.2d 344, 320 N.Y.S.2d 671 (1971); *People v. Villaneuva,* 65 Misc.2d 484, 318 N.Y.S.2d 167 (1971); *Hayes v. Municipal Court,* 487 P.2d 974 (Okla. Crim. 1971); *Portland v. James,* 251 Or. 8, 444 P.2d 554 (1968); *Portland v. White,* 9 Or.App. 239, 495 P.2d 778 (1972); *Commonwealth v. Duncan,* 456 Pa. 495, 321 A.2d 917 (1974); *State v. Jamgochian,* 109 R.I. 17, 279 A.2d 923 (1971); *Seattle v. Pullman,* 82 Wash.2d 794, 514 P.2d 1059 (1973); *Seattle v. Jones,* 79 Wash.2d 626, 488 P.2d 750 (1971); *State v. Fisk,* 79 Wash.2d 318, 485 P.2d 81 (1971); *Seattle v. Drew,* 70 Wash.2d 405, 423 P.2d 522 (1967); *State v. Oyen,* 4 Wash.App. 273, 480 P.2d 766 (1971).

We believe that persons are still prosecuted for these offenses throughout the country. If the laws are invalid, defendants may vindicate their constitutional rights by a challenge to the state prior to trial, or direct appeal, or by federal habeas corpus. The indigency of the defendants is no longer an insurmountable obstacle to the successful challenge to the legitimacy of vagrancy and loitering laws. *See Argersinger v. Hamlin,* 407 U.S. 25 (1972).

**F. The case-or-controversy clause does not require suppression.**

Lastly, respondent argues that the evidence be suppressed and a new trial granted because the case-or-controversy clause (U.S. Const. Art. III, § 2) requires that result (RB 58-59). The core of his argument is that if the arrest and search were unlawful, it necessarily follows that the evidence must be suppressed. Respondent's implicit premise is that a person who is the victim of an illegal search has a personal right to the suppression of its fruits. This Court has repudiated that view. The Fourth Amendment and the exclusionary rule are not coextensive. *United States v. Calandra,* 414 U.S. 338 (1974). To determine whether exclusion is appropriate two questions must be resolved: (1) Were the defendant's rights under the Fourth Amendment violated? (2) Would the societal interest in deterring police misconduct be served by excluding the fruits of the search?

In this case the violation of respondent's rights (the first issue) does not require the suppression of evidence because no societal interest would be served thereby (the second issue). The case-or-controversy requirement is satisfied by determining the relief to which respondent is entitled. He has no right to any relief; a decision by this Court so holding will define his rights in the context of this case and will therefore satisfy the case-or-controversy requirement.

Respondent presents a related argument, based on policy considerations, that he should be given relief to encourage other defendants, who are similarly situated, to challenge the legality of the statute under



which they are arrested (RB 59-60). If they know that will receive no redress despite the statutes' invalidity, they will not bother to mount an attack. We disagree.

Petitioner has argued that the arrest under an unconstitutional statute must be reasonable and in good faith. The invalidity of a statute is relevant in the determination of both questions. Thus, a trial court may find that an officer's arrest under an obviously invalid law was in bad faith, made as a pretext for a search. *Cf. United States v. Lefkowitz,* 285 U.S. 452 (1932). The statute could be so lacking in criteria that probable cause for an arrest would be almost a legal impossibility. *Cf. Younger v. Harris,* 401 U.S. 37, 53-54 (1971). Once the defendant has established the invalidity of the law, the prosecution would bear the burden of showing that the arrest was reasonable and in good faith. Failure to carry the burden would result in suppression. In this case the burden was met. The evidence was properly admitted.

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## II

**SEARCHES MADE IN REASONABLE RELIANCE UPON A COORDINATE BRANCH OF GOVERNMENT SHOULD NOT BE COGNIZABLE UNDER 28 U.S.C. § 2254**

Respondent argues that the Habeas Corpus Act of 1867 was enacted to permit state prisoners to relitigate all federal claims in federal court (RB 74-78). We submit that Congressional intent in passing the Act is far from clear. It is doubtful that it was in-

tended to vindicate the due process rights of state prisoners because in 1867 those rights were nonexistent. Even assuming that to be the purpose of federal habeas corpus, we submit that Fourth Amendment claims of state prisoners could not be considered on collateral review because the purpose of the exclusionary rule is to deter police misconduct, not to vindicate due process.

Adverting to the claim that Congressional inactivity indicates its approval of the cognizability of Fourth Amendment claims on habeas corpus (RB 79-82), we respond that this Court did not decide *Kaufman v. United States,* 394 U.S. 217, until 1969, three years after the law was last amended. Congress's subsequent failure to amend the habeas corpus statute cannot relieve this Court of its obligation to determine whether the deterrent purpose of the exclusionary rule, a judicially fashioned remedy, is served by its application on federal habeas corpus.

Respondent's policy arguments are not convincing (RB 84-92). He assumes, rather than proves, that federal review of federal questions is necessary to protect Fourth Amendment values (RB 87-88). The uniformity of decision which he seeks by federal review is probably an illusory objective. Respondent's attempt to minimize the burden placed upon federal courts is based on the premise that they need do no more than review transcripts of state hearings and "correctly" apply the law to achieve a "just" result (RB 90). He does not recognize that many prisoners have failed to litigate their constitutional claims in



state court; if the state cannot establish a knowing and deliberate bypass, the prisoner will be entitled to an evidentiary hearing on the merits. This burden, no matter how insignificant relative to the balance of the workloads of federal courts, is intolerable in light of the absence of proof that suppression of evidence on habeas corpus has any deterrent value.

Respondent argues that innocence is an irrelevant question in the context of federal habeas corpus, which is designed to vindicate due process (RB 92). However, since suppression of evidence does not vindicate due process and, on collateral review, probably does not deter future police misconduct, we submit that the cognizability on habeas corpus of Fourth Amendment questions is justified only if the prisoner can make a colorable claim of innocence. Respondent has not done so in this case.

Respondent's claim that adoption of our position would be untenable in light of *Lefkowitz v. Newsome,* 420 U.S. 283 (1975), is specious (RB 94). *Newsome* simply holds that a plea of guilty by a state defendant does not foreclose consideration of his federal claims on federal habeas corpus if the state law permits a plea of guilty without a consequent forfeiture of appellate review of specified constitutional issues. The rule of *Newsome* is procedural; it does not bear upon the substantive issue whether Fourth Amendment claims should be raised *at all* on federal habeas. If this Court decides to overrule *Kaufman,* it would mean that no search and seizure claims by state prisoners, whether they pleaded guilty or were convicted

upon a plea of not guilty, would be cognizable. *Newsome* would still retain vitality, for all *other* federal questions could still be raised by state prisoners if the state has a statute similar to those of New York and California.

Finally, respondent argues that this search in the instant case should be cognizable. He contends that no guidelines exist to distinguish between "wanton" and "technical" violations (RB 96-97), that the violation in this case was gross (RB 97), and that the officer's reliance upon the ordinance cannot validate the search (RB 99). Petitioner replies that a technical violation has occurred when the policeman making the search or seizure has reasonably and in good faith relied upon a coordinate branch of the government, either the legislature or the judiciary. The violation in this case was technical. Reliance upon the statute cannot validate the search, but it does make inappropriate suppression of the evidence and reversal of the conviction.

**A. Neither the historical nor modern function of habeas corpus renders search claims cognizable on collateral review.**

Although it is probably too late in the day to question this Court's revisionist view of the purpose of habeas corpus *(see Fay v. Noia,* 372 U.S. 391 [1963]), we feel compelled to note that it was almost certainly not intended to be a functional writ of error for relitigation of federal questions arising in state courts. *See Schneckloth v. Bustamonte,* 412 U.S. 218, 250-56 (1973) (Powell, J., concurring); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State*



*Prisoners,* 76 Harv. L. Rev. 441, 463-507 (1963); Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian,* 33 U.Chi. L.Rev. 31, 33-58 (1965); Oaks, *Legal History in the High Court—Habeas Corpus,* 64 Mich. L. Rev. 451, 458-68 (1966). This Court has declared: "Vindication of due process is precisely [the writ's] historic office." *Fay v. Noia, supra,* 372 U.S. at 402. However, there is ample reason "to doubt that the draftsman of the habeas measure, or any of its proponents, had in mind its possible utilization as a remedy for denials of due process of law or of equal protection of the laws. This could have been their intention only if they foresaw an expansion of the due process clause that was still decades in the future." *Mayers, supra,* at 54 (fn. omitted). In *Fay,* this Court offered no evidence to indicate why it believes that the Congress of 1867 was gifted with a collective prescience of mind.

Even assuming that habeas corpus was intended to be a vindicator of due process, it is still not apparent to petitioner why Fourth Amendment claims may be considered on federal collateral review. The exclusionary "rule is a judicially created remedy *designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.*" *United States v. Calandra, supra,* 414 U.S. at 348 (emphasis added). A defendant has no due process right to suppression of evidence seized during an illegal search; he is at most an incidental beneficiary. Exclusion of evidence is a societal right. If, then, sup-

pression does not vindicate due process, we do not perceive how evidence can be ordered suppressed on federal habeas corpus. The remedy is inappropriate to the purpose of the writ, which is designed to vindicate personal, not societal, rights. If no defendant has a personal right to exclusion, no federal court has jurisdiction to suppress evidence on collateral review.

**B. Congressional acquiescence does not relieve this Court of its obligation to determine whether the purpose of the exclusionary rule can be served on habeas corpus.**

Respondent observes that Congress did not withhold from federal courts jurisdiction over search and seizure claims on the last occasion that it amended section 2254 and that it has declined all recent invitations to do so. Respondent concludes that Congressional inactivity manifests its approval of relitigation of Fourth Amendment questions on federal collateral review (RB 79-82).

With regard to the failure of Congress to withhold jurisdiction in 1966 over search claims, we note that this Court at that time had not ruled definitively that habeas corpus relief was available to a state prisoner who alleged a Fourth Amendment violation. A majority of the federal decisions had held that search questions were not cognizable under sections 2254 and 2255. *See Schneckloth v. Bustamonte, supra,* 412 U.S. at 272 (Powell, J., concurring); *Kaufman v. United States, supra,* 394 U.S. at 220-21, nn. 3-4.

Congress's subsequent inaction does not necessarily betoken approval. Inaction may mean only



"that Congress does not intend to act at all. . . . In short, although recognizing that by silence Congress at times may be taken to acquiesce and thus approve, we should be very sure that, under all the circumstances of a given situation, it has done so before we so rule and thus at once relieve ourselves from and shift to it the burden of correcting what we have done wrongly. The matter is particular, not general, notwithstanding earlier exceptional treatment and more recent tendency. Just as dubious legislative history is at times much overriden, so also is silence or inaction often mistaken for legislation." *Cleveland v. United States,* 329 U.S. 14, 23-24 (1946) (Rutledge, J., concurring).

More fundamentally, respondent has misconceived the relevant inquiry, which is whether the exclusionary rule, a judicially created device, will efficaciously serve its remedial objectives on federal habeas corpus. Just as this Court has created the rule, so also it must determine in what context the rule will be applied. We have argued that the deterrent value of the exclusionary rule on collateral review is so speculative as to be unproven (Brief of Petitioner at 39-45). The rule was never intended to vindicate due process. If this Court agrees with these conclusions, it must overrule *Kaufman,* for no purpose would be served by the suppression of evidence on collateral review. The effectiveness of the exclusionary rule, not the scope of section 2254, is at issue here. That question, in the first instance, must be decided by this Court, not Congress.

**C. Respondent's policy arguments do not justify the continuing vitality of Kaufman.**

Respondent argues that a balance of the relevant policy considerations militates in favor of the continuing cognizability of search and seizure claims on federal habeas corpus (RB 84-92). At the outset we note that the balancing technique in constitutional adjudication is a subtle and subjective process. At most, litigants can identify and analyze the factors to be weighed in the balance. This Court must determine the value which must be accorded to each of the components. It is the assignment of value, not the mere identification of the considerations, which ultimately determines the resolution of the constitutional question.

Respondent contends that the overruling of *Kaufman* would result in the erosion of the Fourth Amendment by hostile state judiciaries and hopeless confusion in national Fourth Amendment jurisprudence (RB 87-88). *See* Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners—Reform or Revocation?,* 61 Geo. L.J. 1221, 1226, 1251 (1973); *Developments in the Law—Federal Habeas Corpus,* 83 Harv. L. Rev. 1038, 1057-61 (1970); Note, *Federal Habeas Corpus For State Prisoners and the Fourth Amendment,* 52 N.Car. L. Rev. 633, 640 (1974). Stated more fully, respondent's first argument is that this Court is unable to consider on certiorari more than a small fraction of the state cases involving Fourth Amendment issues; thus, this function must be performed by federal courts on habeas corpus. If it is



not, state judiciaries may subvert Fourth Amendment values.

This argument proceeds from the assumption that all federal claims must ultimately be decided by a federal court, a proposition apparently not free from doubt. *See Huffman v. Pursue, Ltd.,* 420 U.S. 592, 606 & n. 18 (1975). Respondent's second assumption is that a significant number of state courts are unwilling to suppress evidence if it would free guilty defendants. We share Mr. Justice Powell's opinion that this ground of concern is less realistic than in years past. *Schneckloth v. Bustamonte, supra,* 412 U.S. at 260 n.13 (Powell, J., concurring). As a ready example, we observe that several state courts have invalidated searches which would be permissible under *United States v. Robinson,* 414 U.S. 218 (1973). *See People v. Brisendine,* 13 Cal.3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975); *States v. Kaluna,* 55 Hawaii 361, 520 P.2d 51 (1974); *People v. Copeland,* 77 Misc.2d 649, 354 N.Y.S.2d 399 (1974); *People v. Kelly,* 77 Misc.2d 264, 353 N.Y.S.2d 111 (1974). We simply cannot accept respondent's facile assumption that states are unconcerned with their citizens' right to privacy. If that were true, the adoption of the exclusionary rule by over one-half of the states prior to *Mapp v. Ohio,* 367 U.S. 643 (1961), becomes inexplicable. *See Elkins v. United States,* 364 U.S. 206, Appendix 224-32 (1960).

Turning to the argument that federal collateral review will promote uniform application of federal law, we do not perceive why 94 district courts and

11 circuit courts will achieve this objective more successfully than state tribunals. *See Annual Report of the Director of the Administrative Office of the United States Courts—1974* at 213 (1975); C. Wright, *Law of Federal Courts* §3 at 8 (2d Ed. 1970). The belief that only federal courts could achieve uniformity of decision on federal questions led to this Court's decision in *Swift v. Tyson,* 41 U.S. (16 Pet.) 1 (1842). *See* R. Leflar, *American Conflicts Law* 149-50 (1968). That theory did not receive its quietus until a century later. *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938). We ask this Court not to resurrect a doctrine so deservedly buried.

Respondent's doubts that relitigation of Fourth Amendment issues on federal habeas corpus produces an excessive workload is based upon the assumption that federal courts need only review transcripts of the state suppression hearings to arrive at their decisions (RB 90). He does not realize that failure to raise a constitutional issue in state court does not necessarily foreclose its litigation on habeas corpus. *See Fay v. Noia,* 372 U.S. 391, 439 (1963). Thus, a state prisoner may be entitled to an evidentiary hearing years after the search has occurred; as a result, "the validity of a search-and-seizure claim frequently hinges on a complex matrix of events which may be difficult indeed for the habeas court to disinter. . . ." *Schneckloth v. Bustamonte, supra,* 412 U.S. at 263 (Powell, J., concurring).

Additionally, respondent's calculus ignores the time and energy which the state agencies must expend in



their overwhelmingly successful attempts to refute the contentions of the habeas petitioners. *See* Note, *supra,* 61 Geo. L.J. at 1251 n.202 (relief granted in 4 per cent of the cases). Finally, no matter how seemingly insignificant is the burden upon the administration of justice, it is unjustifiable if it serves no purpose.

**D. Fourth Amendment claims of state prisoners should be cognizable on federal habeas corpus only if the state has not afforded an adequate corrective process or if the petitioner can allege his innocence in good faith.**

Respondent contends that the innocence of a prisoner is irrelevant to the question whether the writ of habeas corpus is available, since the function of the writ is to vindicate due process (RB 92). We submit that, since exclusion of evidence cannot vindicate due process, the litigation of Fourth Amendment questions on collateral attack must be justified on some other basis, if at all.

We propose two possible justifications. First, if the state has not provided an adequate corrective process (*cf. Frank v. Mangum,* 237 U.S. 309 [1915]), then federal courts are obliged to provide a forum for the litigation of the federal claim. This availability is not based upon the right to vindicate a substantive due process claim; rather, it rests upon the procedural due process right of access to the courts. *Cf. Johnson v. Avery,* 393 U.S. 483 (1969). If the state has not provided access, the federal courts must do so.

Second, the suggestion that the contention of constitutional error be supplemented with a "colorable claim of innocence" (*See* Friendly, *Is Innocence Irre-*

*levant? Collateral Attack on Criminal Judgments,* 38 U.Chi.L.Rev. 142, 151-57, 170 [1970]) is based frankly on a value judgment that no innocent man should be imprisoned as a result of a violation of his constitutional rights. The state's interest in finality cannot justify an unjust incarceration.

In the instant case the respondent had the opportunity to litigate the merits of the arrest and search; he has not claimed that he is innocent. Since suppression of evidence will not vindicate any personal due process right, there is no jurisdictional basis for the issuance of the writ.

**E. Lefkowitz v. Newsome, 420 U.S. 283 (1975), does not compel consideration of Fourth Amendment claims on federal habeas corpus.**

Respondent argues that adoption of petitioner's position that search and seizure claims should not be cognizable on federal collateral review would result in the following anomaly. A state prisoner who has pleaded guilty may raise Fourth Amendment issues on federal habeas corpus. Acceptance of our position would mean that a defendant who has been convicted upon a plea of not guilty would be foreclosed from federal habeas relief. Respondent concludes that the difference in treatment of defendants who have pleaded guilty and those who have been convicted is logically and legally unsupportable (RB 94).

Respondent's argument is based upon a misunderstanding of *Lefkowitz v. Newsome,* 420 U.S. 283 (1975). This Court held in *Newsome* "that when state law permits a defendant to plead guilty without forfeiting his right to judicial review of specified constitutional issues, the defendant is not foreclosed from pursuing those constitutional claims in a federal habeas corpus proceeding." *Id.* at 293. Although that case arose out of the litigation of a Fourth Amendment claim, this Court did *not* hold that all search and seizure issues must be litigated on their merits on federal review. Rather, *Newsome* stands for the simple proposition that a plea of guilty in a state court, which plea is intended to facilitate state appellate review, does not foreclose future litigation on federal habeas. The unspoken premise of *Newsome* is that the constitutional question is cognizable on habeas corpus. If this Court overrules *Kaufman,* it will mean that no search claim raised by a state prisoner can be litigated on federal habeas, regardless of whether he pleaded guilty or was convicted upon a plea of not guilty. *Newsome* need not be overruled, for all *other* constitutional claims would be cognizable on habeas corpus, provided that the state has enacted a statute permitting defendants who have pleaded guilty to raise specified issues. *See Lefkowitz v. Newsome, supra,* at 285 n.1.



**F. Searches made in reliance upon a coordinate branch of the government should not be cognizable on federal habeas corpus.**

In the Brief for the Petitioner we argued that the instant search should not be cognizable on federal habeas corpus because it was, at most, a technical violation of the Fourth Amendment (Brief at 45-49). Respondent rejected this claim, arguing that there are no guidelines to distinguish between technical and

gross violations of the prohibition against unreasonable searches and seizures (RB 96-97). We reiterate that a technical violation is one which is the result of a reasonable reliance by the police officer upon a coordinate branch of the government. If the officer making the arrest or search has relied upon a search warrant which was issued upon less than probable cause or upon a statute subsequently declared unconstitutional (*cf. Brown v. Illinois,* 422 U.S. 590, 611-12 [1975] [Powell, J., concurring]), the seized evidence should not be ordered suppressed by a federal court on habeas corpus.

The reasons for this exception are intertwined with the reasons for the exclusionary rule. Ideally, the rule operates to deter police misconduct and to encourage policemen to secure warrants before conducting searches. A police officer who has sought and executed a warrant based upon insufficient information has not committed misconduct; if the evidence is suppressed, he is being punished for doing what this Court has encouraged him to do and he might be reluctant in the future to seek a warrant. Thus, suppression of evidence found during a warranted search will not deter official misbehavior and may have the self-defeating effect of discouraging reliance upon magistrarial judgment.

Similarly, an officer who makes an arrest, based on probable cause, under a presumptively valid statute is not guilty of misconduct. If the evidence is suppressed, he and his fellow officers may be reluctant in the future to enforce validly enacted statutes which



have not passed judicial scrutiny. As a result, officers may not enforce the laws which they have been sworn to uphold. As in the search warrant situation, use of the exclusionary rule becomes self-defeating.

The wisdom of applying the exclusionary rule in the two situations discussed above on direct review is a question not in issue here. We submit that, on federal collateral review, employment of the rule can only have a negative impact. Suppression of the evidence years after it has been seized will chastise the officer for relying upon a search warrant or statute. He and his colleagues will be put on notice that, no matter how reasonable the reliance, it is possible that the defendant may obtain his freedom years afterward. Such a specter can only discourage reliance upon legislatures and magistrates, a reliance which this Court heretofore has encouraged.

Respondent's arguments, that this Court has the obligation to pass upon the validity of state statutes and that a statute cannot validate an unlawful search (RB 99-100), miss the point. Respondent seeks more than the declaration of the ordinance's invalidity; he asks that the evidence be suppressed. That relief should be granted only if it serves some useful purpose. In light of Officer Lattin's reasonable reliance upon the ordinance, suppression would be pointless. We recognize that the ordinance, if invalid, cannot authorize a violation of the Fourth Amendment, but that is not the issue. The question is whether suppression would protect Fourth Amendment values. We submit that it would not.

## CONCLUSION

We respectfully submit that the judgment of the United States Court of Appeals for the Ninth Circuit be reversed.

Dated, January 27, 1976.

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No. 74-1055

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1975

W. T. STONE, WARDEN, PETITIONER

v.

LLOYD CHARLES POWELL, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# BRIEF FOR THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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# BRIEF FOR THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

## INTEREST OF AMICUS CURIAE

The California Public Defenders Association is a non-profit corporation incorporated under the laws of the State of California in 1969. The purpose of the association is to assist organized defender offices in California, whether state or federal, in their ongoing efforts to provide effective representation for indigent criminal defendants. The Association represents approximately 600 defender attorneys and 34 defender offices in the State of California.

The suggestion of petitioner that state prisoners be prohibited from asserting Fourth Amendment violations in a federal habeas corpus petition would drastically affect the administration of criminal justice that would not only detract from the function of the Great Writ but would mark the resurrection of the illogical and unfair dichotomy of acknowledging the exclusionary rule only in federal cases. Cf. Wolf v. Colorado, 338 U.S. 25 (1949). State prisoners have a theoretical right to petition for redress (petition for writ of certiorari) for a violation of the Fourth Amendment in this Federal Court, but such chance of review is rare. The only meaningful opportunity is in the lower federal courts by a petition for writ of habeas corpus. The federal courts should remain open to state as well as federal defendants to enforce the Fourth Amendment of the Constitution of the United States.

The California Public Defender Association, in its goal to improve the availability of legal services for those charged or convicted of crime who because of their lack of finances would not be able to employ counsel are especially sensitive to the obstacles now before the indigent California prisoner who attempts to secure relief in the federal courts. This Court has advised in Ross v. Moffitt, 417 U.S. 600 (1974), that the convicted are not entitled to counsel on a petition for a writ of certiorari issued by this Court, and thus the prisoner



in seeking relief for a Fourth Amendment exclusionary rule claim in this Court will be substantially handicapped. [1] The state prisoner, ordinarily without funds for counsel, must fend for himself in the local federal courts in seeking post-conviction relief. He will be furnished standard district court forms for his 28 U.S.C. 2254 petition, with which he must present his claims. Most often the petition is denied after filing without requiring a response from the state agency. Only rarely is a hearing granted, and the appointment of counsel is discretionary with the district court. 18 U.S.C. 3006A(g). Although there are approximately 8000 state prisoner habeas corpus petitions filed each year (1972-1975, The U.S. Courts: A Pictorial Summary 1975, p. 5), very few require significant review and far less any litigation. The number of filings creates a distorted image of the actual processing of a habeas corpus petition at the lower federal court levels. The proposed exclusion of Fourth Amendment claims from this historically flexible remedy is both unwarranted and unnecessary. The state prisoner will be denied an important avenue to assert his federal claim, and the restriction of the exclusionary rule would have little effect on the number of such prisoner petitions filed. The erosion of the exclusionary rule is not consistent with fair implementation of the Fourth Amendment, and those suffering substantial imprisonment (those state prisoners serving short terms are not interested in pursuing such remedies, and although the Court has relaxed the requirements of "custody," experience still indicates that such petitions are filed by those serving long term confinement) should be allowed meaningful access to the federal courts in the assertion of claims arising from an unlawful search and seizure.

This brief is filed in support of the respondent.

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1

Recent California legislation (S.B. 1018) was recently signed into law creating a State Public Defender who will be authorized to file petitions for writs of certiorari to this Court, but this office will not function until 1 July 1976.

## SUMMARY OF ARGUMENT

So long as the principle of stare decisis is to remain the judicial theme by which the individual citizen is to order his affairs predictably against unpropitious surprise and the means by which the judiciary fosters the maintenance of public confidence in impersonal and reasoned judgments, the basic principles of judicial decision making mandate against the constant review by this Court of a repeatedly decided question. Whether Fourth Amendment exclusionary claims are available to the state prisoner under 28 U.S.C. 2254 is a question which this Court has confronted in this and each of the two preceeding years and in each case has entertained and decided the availability of the exclusionary claim of the petitioning state prisoner in the context of Fourth Amendment issues. Lefkowitz v. Newsome, 420 U.S. 283 (1975); Cardwell v. Lewis, 417 U.S. 483 (1974); Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Such recent resolutions of this question should be respected in light of purposes to be advanced by stare decisis.

Additionally, several purposes of the Fourth Amendment exclusionary rule require that state prisoners be provided its continued accessibility in federal habeas corpus relief. Since this Court's decision in Weeks, different purposes of the exclusionary rule have been advanced to support various specific conclusions as to its justification. The rule serves to implement the Fourth Amendment and thereby makes its commands self-executing. It also insulates the judiciary from involvement in Fourth Amendment violations as well as protects the rights of privacy of citizens generally. Moreover, in fulfilling these purposes, together with the purpose of deterrence, the rule is designed to foster the confidence of the public that their government officials will obey the commands of the Fourth Amendment. Clearly, much more than deterrence alone should be considered in any new application of the exclusionary rule. It follows, a fortiori, that each purpose of the rule should be reviewed when the question confronting this Court requests for its



resolution a possible foreclosing a long accepted application of the rule.

Finally, even if deterrence stood alone as the one reason for exclusion, the rule should still be sustained in its fullest application in the present context of the availability of federal habeas corpus relief to the state prisoner. There must exist an accountability on behalf of both law enforcement and legislatures to the demands of the Fourth Amendment. The argument of the petitioner that neither of these two arms of the government is to be deterred and, therefore, the exclusionary rule is not to be applied where an arrest and search made pursuant to a yet unchallenged vagrancy ordinance results in the seizure of evidence, is to say that a legislative body is free to establish an unconstitutional standard for arrest which until challenged will act as a shield to law enforcement violations of the Fourth Amendment. The ruling of this Court can and should deter such practice. This Court should not permit such an affront to the law as an unconstitutional vagrancy ordinance to stand, even for a moment, as an exception to the dictates of the Fourth Amendment.

I.

THE PRINCIPLE OF STARE DECISIS, EVEN IN THE FLEXIBLE APPROACH TO CONSTITUTIONAL QUESTIONS, SHOULD BE HONORED IN THE RETENTION OF THE EXCLUSIONARY RULE ON FEDERAL HABEAS CORPUS.

Constitutional questions are always open to re-examination, but the principle of stare decisis remains a powerful force in our jurisprudence. United States v. Maine, 420 U.S. 515, 527 (1975). The reasoning underlying this principle was explained in Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970):

> "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors."

In 1904 this Court refused to adopt the exclusionary rule for illegally seized evidence in state criminal proceedings. Adams v. New York, 192 U.S. 585 (1904). Ten years later, however, this Court fashioned the exclusionary rule to implement the Fourth Amendment in federal criminal proceedings. Weeks v. United States, 232 U.S. 383 (1914). Thereafter a steady but obvious development resulted in the



Fourth Amendment, but not the exclusionary rule, being applied to the States through the conduit of the Fourteenth Amendment Due Process Clause. Wolf v. Colorado, 338 U.S. 25 (1949). The chronological development led to the removal of restrictions on the exclusionary rule such as the "silver platter doctrine" which was eliminated by Elkins v. United States, 364 U.S. 206 (1960).

In 1961, this Court announced that the exclusionary rule would apply to state criminal proceedings. Mapp v. Ohio, 367 U.S. 643 (1961). In 1965, the Court indicated that the remedy of federal habeas corpus was available to a state prisoner to assert the exclusionary rule announced in Mapp. Henry v. Mississippi, 379 U.S. 443, 452-453 (1965). Thereafter lower federal courts and this Court granted such relief to state prisoners through this procedural mechanism. Cf. Whitely v. Warden, 401 U.S. 560 (1971); Mancusi v. DeForte, 392 U.S. 364 (1968). In 1969 the collateral attack for an unlawful search and seizure available to the state prisoner was extended to the federal prisoner. Kaufman v. United States, 394 U.S. 217 (1969). These cases, especially since 1961, firmly establish the availability of the exclusionary rule to state prisoners both in direct and federal collateral attack on their convictions.

The continued use of the federal habeas corpus remedy was seriously challenged by the concurring opinion of Mr. Justice Powell in Schneckloth v. Bustamonte, 412 U.S. 218 at 250 (1973). In that concurring opinion, which was joined by the Chief Justice and Mr. Justice Rehnquist, Mr. Justice Powell stated that the Mapp exclusionary rule was not applicable in a federal habeas proceeding. Mr. Justice Blackmun agreed with nearly all of that which Mr. Justice Powell had to say, but refrained from joining because the case did not present a situation requiring that Kaufman v. United States, 394 U.S. 217 (1969) be overruled. 412 U.S. 218, 249. The issue was not met in Schneckloth because this Court resolved the case against the state prisoner. In Cardwell v. Lewis, 417 U.S. 583 (1974), the view espoused by Mr. Justice Powell directly contributed

to the disposition of the case. The plurality opinion of Mr. Justice Blackmun, joined in by the Chief Justice and Justices White and Rehnquist, held that the state prisoner, Arthur Ben Lewis, had not been the victim of an unlawful search where the police towed the defendant's car to a police impoundment lot and there took paint scrapings from the exterior of the car and observed the tire tread. The four dissenting Justices stated there had been an impermissible search without a warrant. Mr. Justice Powell cast the critical vote but did not adopt the plurality upholding the warrantless search but instead relied upon his concurrent opinion in Schneckloth v. Bustamonte in which he had suggested that federal habeas corpus review of a state criminal conviction be narrowed so as to remove Fourth Amendment claims based upon the exclusionary rule. 417 U.S. 483, 596.

The issue again has recently been resolved by this Court's opinion in Lefkowitz v. Newsome, 420 U.S. 283 (1975), [2] for in this case this Court recognized the right of a state prisoner to assert a search and seizure question by way of federal habeas corpus after a plea of guilty.

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2 In Lefkowitz the defendant had been arrested for loitering and a search at the time of his arrest revealed narcotics. Pending the federal petition, the New York Court of Appeals held the loitering statute unconstitutional, and the federal courts agreed holding that the arrest and search were improper. This Court had limited its review to the assertion of a constitutional violation after a plea of guilty in the state court, and it would appear that the fact situation would not be controlling precedent. It should be noted, however, that the Second Circuit's opinion was relied upon by the Ninth Circuit in its decision in the present case. See Powell v. Stone, 507 F.2d 93, at 96 (9th Cir. 1974).



Implicit in this holding is the recognition of a state prisoner to assert the exclusionary rule on a federal habeas corpus claim. Mr. Justice Powell, joined by the Chief Justice and Mr. Justice Rehnquist, dissented based upon his concurring opinion in Schneckloth v. Bustamonte, 420 U.S. 283, 302. Mr. Justice White dissented on another ground that the plea of guilty foreclosed review. 420 U.S. 283, 294.

The recent resolution of this important question should be respected. The alternative would be chaos, in which the same question, although decided on a five to four basis, would be re-litigated each term. Basic principles of judicial decision making mandate against constant review.

II.

## THE SEVERAL PURPOSES OF THE FOURTH AMENDMENT EXCLUSIONARY RULE REQUIRE ITS CONTINUED AVAILABILITY TO STATE PRISONERS SEEKING FEDERAL HABEAS CORPUS RELIEF

The Court of Appeals found two purposes to support its justification of the exclusionary rule: (1) deterrence of unconstitutional conduct by state officials and (2) "the imperative of judicial integrity"--courts should not be a party to the lawless invasions of constitutional rights. 507 F. 2d 93, 98. The petitioner lists three purposes of the rule: the two cited by the Court of Appeals and the right of privacy. (Brief for Pet. 25-26). The petitioner then contends that the right of privacy and the imperative of judicial integrity are not valid purposes for the rule and criticizes the deterrence effect on legislative bodies.

Since the creation of the exclusionary rule different purposes have been recognized for its justification. The selection of a particular purpose will tend to justify or support a specific conclusion. The decision making process should involve all the several purposes for the rule. When the rule is limited to the deterrence purpose alone, as suggested by the petitioner, much of the reasoning and precedent will be unfairly neglected. The Court should re-evaluate the use of the rule in light of its several purposes.

The purposes attributed by this Court for the Fourth Amendment exclusionary rule are:

A. The Exclusionary Rule Implements the Fourth Amendment.

In Weeks v. United States, 232 U. S. 383 (1914), this Court stated:



> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." 232 U. S. 383, 393.

The Court went on further to state:

> "The effect of the 4th Amendment is to put the courts of the United States and Federal officials in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and

to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." 232 U. S. 383, 391-392.

The early statements of purpose rely heavily on theoretical considerations in the effective enforcement of the Fourth Amendment. There is no balancing or weighing process, which is a later concession to the pragmatic demands of efficient law enforcement (other than the Constitutional requirements).

Chief Justice Taft in Olmstead v. United States, 277 U. S. 438, 442 (1928), stated:

> "The striking outcome of the Weeks case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in court, really forbade its introduction, if obtained by government officers through a violation of the amendment."

In Mapp v. Ohio, 367 U. S. 643 (1961), which outlines the history and development of the rule, the Court echoed the continuing sentiment that the Fourth Amendment was self-executing:

> "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the Weeks rule the assurance against unreasonable federal searches and seizures would be "a form of words", valueless and undeserving of mention in a perpetual charter



> of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in 'the concept of ordered liberty.'" 367 U. S. 643, 655.

If the Fourth Amendment is to have effective meaning, then evidence adduced in its violation must be excluded from federal and state trials.

B. The Exclusionary Rule Insulates the Judiciary from participation in Violation of the Fourth Amendment.

In Weeks, the U. S. Marshal, an officer of the court, improperly secured evidence by an unlawful search and seizure, and the Court held the evidence inadmissible. The Court held:

> "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." 232 U. S. 383, 894.

This same purpose was acknowledged in Mapp v. Ohio, 367 U. S. 643, 648-649, 659-660 (1961), and United States v. Peltier, 95 S. Ct. 2313, 2317 (25 June 1975), but the phrase, "the imperative of judicial integrity" was fashioned in Elkins v. United States, 364 U. S. 206, 222(1960).

Although exceptions have been made to the exclusionary rule, one of the primary purposes was to

announce that sub silentio the judiciary would not approve illegal searches. If only words of condemnation were used, the judiciary could not escape criticism that, in truth and in fact, it approved of the unlawful seizure of the evidence. The exclusionary rule is affirmative proof that the judiciary respects Fourth Amendment rights.

C. The Exclusionary Rule Protects the Rights of Privacy of Citizens Generally.

In Mapp, this Court recognized "the exclusion doctrine (as) an essential part of the right of privacy." 367 U.S. 643, 656. In Katz v. United States, 389 U.S. 347 (1967), the Court reasoned that "the Fourth Amendment protects people, not places" (389 U.S. 347, 351) and noted that the Fourth Amendment protects individual privacy against certain kinds of governmental intrusion. 389 U.S. 347, 350. In the plurality opinion of Justice Blackmun in Cardwell v. Lewis, 417 U.S. 583 (1974), he stated:

> "Rather than property rights, the primary object of the Fourth Amendment was determined to be the protection of privacy. Id., at 305-306. And it had been said earlier, 'The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy.'" 417 U.S. 583, 589.

D. The Exclusionary Rule is designed to deter present and future Violations of the Fourth Amendment.

Contrary to the opinion of those bent on restricting or eliminating the exclusionary rule, deterrence is not the only purpose of exclusion. As one of several purposes, it was recognized early in Weeks:



> "[T]his court said that the 4th Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law, acting under legislative or judicial sanction. This protection is equally extended to the action of the government and officers of the law acting under it." 232 U.S. 383, 394. (Emphasis added).

The peitioner's argument is that deterrence is directed only against law enforcement officers. (Brief of Pet. pp. 35-37), but this interpretation is unduly restrictive and fails to consider the established precedent of this Court. The exclusionary rule not only deters the individual officer but also government itself (i.e. legislature or city council). The most frequently cited quote as to this purpose of the rule is in Elkins v. United States, 364 U.S. 206, 217 (1960):

> "Its purpose is to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it."

In United States v. Peltier, 95 S. Ct. 2313, 2317 (25 June 1975), the Court in context of the retroactive application of a decision outlawing certain immigration searches placed reliance upon the deterrance purpose.

E. The Exclusionary Rule is designed to insure Public Confidence that Government Officials do obey the Commands of the Fourth Amendment.

This purpose of the exclusionary rule, although implicit in the holding in Weeks, was probably first expressly formulated in the well-known quote of Mr. Justice Brandeis in his dissenting opinion in

Olmstead v. United States, 277 U. S. 438, 485 (1928):

> "In a government of laws existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means -- to declare that the Government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

The substance of this quote was cited in Mapp v. Ohio, 367 U. S. 643, 659 (1961). In light of recent violations of the Fourth Amendment by officials at the highest level of government which involved the public with greater cynism about government, the comments of Justice Brennan express a purpose needed in contemporary society:

> "The exclusionary rule, if not perfect, accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people -- all potential victims of unlawful government conduct -- that the government would not profit from its lawless behavior, thus minimizing the risk of seriously



> undermining popular trust in government. United States v. Calandra, 414 U. S. 338, 357 (1974) (Dissenting opinion).

In the evaluation and application of the exclusionary rule, each purpose should be reviewed. More than deterrence is involved. Even if focus was limited to deterrence, then this Court should sustain its present use on federal habeas corpus review as a necessary compliment to existing state review. Without habeas corpus review, federal review is meaningless, [3] and state courts, in response to pressure from local law enforcement activities and aware of the lack of federal review, establish any standard for Fourth Amendment claims. It is one thing to cut new ground with the exclusionary rule, but it is quite another to foreclose review that has been available for several years.

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3 The review capability of this Court is limited, and in recent years this Court has been more inclined to grant certiorari petitions seeking to limit the protection afforded under the Fourth Amendment by a lower federal or state court.

Such retrogression is inconsistent with the declared purposes of the rule. [4]

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[4] Although the efficacy of the exclusionary rule has not been formally established by empirical data, those involved in the day-to-day operation of the criminal justice system are only too aware of the illusory value of other alternatives. Criminal and civil court actions and administrative proceedings against law enforcement have been ineffective in deterring Fourth Amendment violations The one often neglected advantage of the exclusionary rule is that it avoids proliferation of litigation. Those who suggest and favor the separate civil suit to enforce the Fourth Amendment must not be aware of the burdening caseload of the courts or know, in fact, that such a civil suit is an illusory remedy.



III.

## THE STOP AND ARREST OF RESPONDENT ON THE AUTHORITY OF AN UNCONSTITUTIONAL VAGRANCY ORDINANCE WAS IN VIOLATION OF THE FOURTH AMENDMENT AND THE EFFECTS SEIZED AT THAT TIME MUST BE SUPPRESSED.

This Court in granting certiorari asked that an additional question be briefed. That question posited that the district court had found probable cause to arrest the respondent for a previously unchallenged vagrancy ordinance. Although the district court found probable cause from the ambiguous actions and responses of the respondent to justify his arrest under the vagrancy ordinance (Pet. for Certiorari, App. B, pp. xvii-xix), the Court of Appeals found that this particular vagrancy ordinance subverted the requirement for probable cause in two ways: (1) it authorized arrest on suspicion and (2) there were no reasonable criteria by which to detect a violation. 507 F.2d 93, 96-97.

Vagrancy laws are sui generis, because their primary purpose is to justify police control and removal of undesirable persons. The offense itself is of doubtful social utility in protecting the public, but the police control is rationalized in what misconduct it might anticipate. It is most difficult to accept the petitioner's argument that relief may be obtained by attacking the ordinance (Brief of Pet. p. 36), for the respondent seeks redress from the search, not the defective ordinance. The ordinance, by its vicarious use in this case, was a means to justify police action rather than to right a substantive wrong. This vagrancy ordinance was an open license to arrest on suspicion, which this Court has clearly rejected. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). An arrest, which occurred here, must be based on probable cause. Beck v. Ohio, 379 U.S. 89 (1969). The facts, even in context of the ordinance, did not rise to the level of probable cause. More importantly, the facts giving rise to the stop and questioning did not amount to a reasonable suspicion so that any information derived from the stop and questioning would be inadmissible. United States v. Brignoni-Ponce, 95 S. Ct. 2574(30 Jun 75)

Without the vagrancy ordinance there could be no lawful stop and arrest. With the vagrancy ordinance, even if patently unconstitutional, the petitioner seeks to justify the arrest. The petitioner relies upon the recent decision in United States v. Peltier, 95 S. Ct. 2313 (25 June 1975). Such reliance is misplaced. An open-ended vagrancy ordinance cannot be compared with statutory and implementing administrative regulations controlling the immigration of aliens. The statutes relied upon by the immigration officials had been judicially approved by the lower federal courts for a number of years. If the petitioner's argument is extended to its logical conclusion, there could be no application of the exclusionary rule because every case rules on a search conducted in the past.

Simply stated, may the legislative body establish a standard which, until challenged operate as a shield for patent violations of the Fourth Amendment? For example, if the City of Henderson, Nevada, passed an ordinance that no yellow-skinned persons could remain in that town after sundown, would the arrest and search of such a person after sundown be permissible? [5] This ordinance would violate the Fourteenth and Fifth Amendments, and if it permitted the arrest of the person, then it would violate the Fourth Amendment protection against unlawful seizure of that person. The danger of "bootstrapping" is obvious when the police officer may justify any arrest by reliance on any ordinance. The argument of petitioner is that neither the police officer nor the legislature will be deterred, therefore, the exclusionary rule need not be applied. But both the individual officer and the legislative body are required to respect the demands of the Fourth Amendment. There must be accountability. In this case, the ordinance was not a law nor gave the appearance of a

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5 This hypothetical ordinance has greater clarity than the defective vagrancy ordinance.



constitutionally authorized law but rather was an affront to the law. It would be a strange irony to use this particular ordinance as a shield to the Fourth Amendment.

## CONCLUSION

For the foregoing reasons, as well as those contained in respondent's brief, the California Public Defender Association, as amicus curiae requests that this Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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